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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
*Petitioner*

v.

WILLIAM LENNON, Sheriff of Philadelphia,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## INDEX


| | Page |
|---|---|
| Petition | 1 |
| Citations to Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | |
| 1. Habeas Corpus Question | 5 |
| 2a. Federal Function Question | 9 |
| 2b. Federal Territory Question | 11 |
| 3. 4th and 5th Amendment Question | 14 |
| Conclusion | 16 |
| Appendix A: Text of Constitutional Provisions and Statutes Involved | 17 |
| Appendix B: Opinion of Court of Appeals, Judgment, and Order on Petition for Rehearing | 19 |


## TABLE OF CASES


Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525 ..... 12
Graves v. New York ex rel O'Keefe, 306 U.S. 466 ... 13, 15
Howard v. Commissioners, 344 U.S. 624 ..... 9
Johnson v. Maryland, 254 U.S. 51 ..... 11
Kiker v. Philadelphia, 346 Pa. 624, 31 A2d. 289, cert. den. 320 U.S. 741 ..... 3, 13
Ladd, In re, 74 Fed. 31 ..... 8, 12
Neagle, In re, 135 U.S. 1 ..... 6, 8
Offutt Housing Co. v. Sarpy, 351 U.S. 253 ..... 13
Philadelphia v. Cline, 158 Pa. Super. 179, 44 A2d. 680, cert. den. 328 U.S. 848 ..... 4

Page

Philadelphia v. Schaller, (Pa.) 25 A2d. 406 ..... 13
P.U.C. v. Pollak, 343 U.S. 451 ..... 14
Schwarts v. O'Hara Twp. School Dist., 375 Pa. 440 .. 14
Shaffer v. Carter, 252 U.S. 37 ..... 15
Spector Motor Services Inc. v. O'Connor, 340 U.S. 602 15
Tatem, Ex parte, 23 Fed. Cas. 708, No. 13759 ..... 12
U.S. v. Twp. of Muskegon, 355 U.S. 484 ..... 9
Wood v. Tawes (Md.) 28 A2d. 850 ..... 13

## STATUTES AND REPORTS

D. C. Code, 1951 Ed., Sec. 23-401, 402, 31 Stat. 1340, 67 Stat. 106 ..... 12
"Force Act," 28 U.S.C. 2241(c)(2) derived from, Act of March 2, 1833, 4 Stat. 632, 634 ..... 5
Interdepartmental Committee for Study of Jurisdiction Over Federal Areas Within the States, GPO, 1956 and 1957 ..... 6, 14
Judicial Code, Section 2241(c)(2) ..... 5
Judicial Code, Section 2254 ..... 8
Senate Report thereon, No. 1559, 80th Cong., 2d. Sess. Amd. 47 ..... 8-9
Senate Report on Buck Act, No. 1625, 76th Cong., 3rd Sess. ..... 13

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, George E. Thompson, on relation of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 18, 1958.

### CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R.* 12a-22a) is reported in 157 F. Supp. 93. The opinion of the Court of Appeals, *infra,* page 19, Appendix B, is reported in 258 F. 2d 320.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 18, 1958, Appendix B, p. 20, *infra,* rehearing was denied on September 17, 1958, *id.,* p. 21. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

* Printed appendix record titled "Appellant's Appendix," appellee having printed no additional material. Nine copies accompany this petition.

## QUESTIONS PRESENTED

This case grows out of the arrest and imprisonment, upon state process, of a civilian employee of the United States within an area in the State under the exclusive jurisdiction of the United States. The essence of the charge was that solely by performing his duties as a federal employee within such area, he had become liable to fine and imprisonment for failing to file a return and pay a tax on his earnings to a municipality of the State. No other jurisdictional fact or event was involved, the employee being a non-resident, and non-domiciliary of the State, at no time setting foot on territory subject to state jurisdiction. The questions presented are:

1. In such case, must the federal employee exhaust state remedies before applying to a federal court for a writ of habeas corpus?

2. Did Congress in the Public Salary Tax Act, removing state tax immunity from federal salaries, or in the Buck Act, removing the immunity from salaries earned in federal areas,

(a) Grant the States power to exercise such penal control over the personal liberty of federal employees in the discharge of their duties?

(b) Grant such territorial jurisdiction over the person in this one regard, while withholding every other attribute of sovereignty?

3. If so, was such grant of power contrary to the Fourth and Fifth Amendments prohibiting arbitrary arrest and seizure, and deprivation of liberty without due process of law?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are Article I, Section 8, Clause 17, and pertinent provisions of the Fourth and Fifth Amendments. Statutes involved are portions of the Public Salary Tax Act, 53 Stat. 575, 5 U.S.C. 84a, and the Buck Act, 54 Stat. 1059, 4 U.S.C. 106, *et seq.* All are printed in Appendix A, *infra*, pp. 17-18.

### Statement

Petitioner is a subordinate federal civil servant living in New Jersey. His employment with the Navy Department requires him to travel from his home in New Jersey across the Delaware River by ferry to work on League Island, a federal enclave on the Pennsylvania side of the river. (R. 3a-4a)

A duly enacted ordinance of the City of Philadelphia imposes an annual tax for general revenue purposes of 1¼%,

> "On salaries, wages, commissions, and other compensation earned * * * by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia." (R. 6a)

As construed by the highest court of Pennsylvania in *Kiker* v. *Philadelphia*, 346 Pa. 624, 31 A2d. 289, Cert. den. 320 U.S. 741, "work done or services performed or rendered," includes the performance of duties by employees of the United States, and "in Philadelphia" includes League Island.

This provision of the ordinance is simply a property tax, imposing no personal liability. However,

here involved are further provisions which require persons whose salaries or wages become subject to the tax to file a quarterly return showing aggregate earnings during the preceding three months, and at the same time to pay the tax thereon. Failure to file a return or pay the tax subjects the individual to arrest, fine, and imprisonment. (R. 5a, 6a) *Philadelphia* v. *Cline*, 158 Pa. Super, 179, 44 A2d. 680 cert. den. 328 U.S. 848.

In discharging his duties as a civilian employee of the United States Department of the Navy, petitioner, a domiciliary and resident of New Jersey, is required to perform services for the United States within the Philadelphia Naval Shipyard on League Island. Situated on the Pennsylvania side of the Delaware River (Geographically Philadelphia), League Island is under the exclusive jurisdiction of the United States, having been acquired by the United States in 1868 with the consent of the State of Pennsylvania, pursuant to Article I, Section 8, Clause 17 of the Constitution of the United States. Under this provision Congress exercises "like Authority" in such places as it exercises over the District of Columbia. League Island has been used by the United States since 1868 solely for building, servicing, and maintaining ships of war and other vessels and equipment of the United States Navy. (R. 3a-4a).

Petitioner failed to file a return or pay the tax. While engaged in the performance of his federal duties, he was arrested by the Sheriff of Philadelphia on League Island. While there restrained of his liberty, he appealed to the United States District Court for the area for a writ of habeas corpus. (R. 2a).

His verified petition admitted the facts which under State law subjected him to the command of the ordinance: (1) performance of duties as a federal employee, (2) in an area within the geographic boundaries of Philadelphia, although under the exclusive jurisdiction of the United States. He expressly negatived all other contact: residence, domicile, property. He does not even set foot on territory within the political jurisdiction of Pennsylvania, travelling from his home in New Jersey direct to League Island by special ferry across the Delaware River. (R. 4a)

The District Court dismissed the petition, as amended, upon motion, because petitioner had failed to exhaust state remedies and also because it found that the city had jurisdiction to impose the tax (R. 14a, 17a, 23a). The Court of appeals affirmed on the same basis and adopted the District Court opinion. Appendix B, *infra*, p. 19. A petition for rehearing and for hearing in banc, nine copies of which accompany this petition, was denied by a 3-1 vote, the 3 remaining judges of the circuit being absent at the time. *id*, p. 21.

## REASONS FOR GRANTING THE WRIT

**1. Habeas Corpus.** This is the first case ever to hold that a federal employee in state custody must exhaust state remedies before raising the claim in a federal court that he is in custody for an act done or omitted in pursuance of the laws of the Congress of the United States.[1] Such claims have, of course, been rejected on their merits, but never has a federal court required

[1] The language of the petition (R. 4a) and of 28 U.S.C. 2241(c)(2) derived from Act of March 2, 1833, 4 Stat. 632, 634, "The Force Act."

exhaustion of state remedies as a condition to raising such claim upon petition for habeas corpus.[2]

The reasons for prompt determination of such cases by federal courts are best recounted in the following language of *In re Neagle*, 135 U.S. 1, 61-62:

> "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers * * * It can act only through its officers and agents, and they must act within the state. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought to the United States court for review, the officer is withdrawn from the discharge of his

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[2] A great number of federal employee habeas corpus cases are collected in a recent study, Report of Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Part II, GPO 1957, pp. 308-313. Significantly there is no mention of the exhaustion principle ever being applied in such cases. None have heretofore been cited by respondent or the courts below.

> duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution."

While lacking some of the glamour of the case of the gunslinging Marshal Neagle, the case which petitioner urges this court to review echoes these considerations in the concrete. The act upon which the State predicates its jurisdiction over petitioner is not simply a fragment of the duties of a federal employee, but the sum total of all his duties. Moreover, those duties are performed in an area acquired pursuant to a constitutional provision designed to insulate those activities not only from any state control, but from any question of state control by making Congress the exclusive legislator for them.

The consequences of state interference are spelled out in the petition and in the amendment thereto. Under state law, in default of $300 bail, petitioner would be imprisoned for almost a full month before being accorded any kind of hearing on the complaint lodged against him by a municipal employee. Such practices are employed almost exclusively against federal employees in petitioner's situation, who are frequently subjected to great indignities and inhumane treatment. Many of them have left federal employment as a consequence. (R. 11a)[3]

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[3] While the District Court had under advisement respondent's motion to strike or dismiss the petition for habeas corpus and the amendment thereto as insufficient on their face, respondent filed an affidavit challenging "on information and belief" some of the allegations of the amendment concening the kind of treatment given federal employees when arrested by Philadelphia authorities. Three days later the court handed down its opinion rejecting some of the allegations of the amendment as "not

It does not seem to petitioner, as it did to the court below (R. 15a, n. 7), that *In re Neagle* depended on the circumstances that a civil servant of the federal government was employed in the business of the courts rather than in the business of the military, any more than *In re Ladd,* 74 Fed. 31, turned upon any consideration of the prisoner being a military rather than a civil servant of the federal government.

While this court has never in so many words ruled upon this subject, it would seem that the decision below was implicitly in conflict with applicable decisions of this court. In any event, doubt in this narrow but important class of cases is in itself an evil. It is a serious weakness in facing rampant localism. It was apparently so regarded by the Senate in amending the 1948 Judicial Code Bill so as to limit the codification of the exhaustion principle to persons in state custody pursuant to the *judgment* of a state court, (28 U.S.C. 2254) for fear that the broader proposal "would unduly hamper federal courts in the protection of federal officers prosecuted for acts committed in the

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supported by the fair preponderance of the evidence," resolving "conflicts" in affidavits, etc. When the Court of Appeals adopted the opinion of the District Court, the seeming incongruity of such statements when there had been no traverse, no evidence, and no hearing, was called to its attention in a petition for clarification accompanying a petition for rehearing and hearing en banc. The foregoing matters are detailed with appropriate references to the record at pages 3 and 4 of the Petition for Clarification, etc., nine copies of which are filed herewith. The Court of Appeals rejected these petitions by a 3 to 1 vote, the remaining three judges of the court being absent during the summer recess. Since review is here sought on the record before the trial court rather than an interpretation of it, no point is made of this matter here except to note that the entire record is very short.

course of official duty." Senate Report No. 1559, 80th Congress, 2d Sess., Amendment No. 47.

**2a. Federal Function.** In construing the Public Salary Tax Act and the Buck Act as authorizing state control over the personal liberty of federal employees solely by reason of their having performed their duties within the State, the court below decided an important question of federal law which has not been, but should be settled by this court.

In *Howard* v. *Commissioners*, 344 U.S. 624, Mr. Justice Douglas for the minority said (p. 629):

> "Congress has not yet granted the local authorities the right to tax the privilege of working for or doing business with the United States."

The majority apparently did not think that this was involved in that case, for they did not discuss the proposition. The parties to that injunction suit were residents of the same county in which the taxing city was located.[4] The ruling of the majority was concerned with the power of the State to alter the borders of its political subdivisions irrespective of federal areas, and whether the tax involved was an "income tax" within the meaning of the Buck Act.

The question suggested by the minority[5] is squarely presented in this case. No complicating factor of

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[4] Transcript of Record, No. 295, October Term, 1952, page 2.

[5] A parallel idea was recently alluded to in *U. S.* v. *Township of Muskegon*, 355 U.S. 484, 486, where, in denying a local tax exemption to a private government contractor, the court remarked: "The case might well be different if the Government had reserved such control over the activities of Continental that it could properly be called a 'servant' of the United States in agency terms."

jurisdictional "contact" is involved save the performance of duties by a federal employee. Moreover, the question here involved is not simply a fragment of jurisdiction known as "jurisdiction to tax" but embraces the very summit of jurisdiction: the power to exercise penal control over the personal liberty of federal employees in the exercise of their duties. Nevertheless, the opinion of the District Court and of the Court of Appeals treat the question here presented solely as a question of "jurisdiction to tax" and place complete and uncritical reliance on a state court opinion in an action to enjoin the collection of what is plainly a simple property tax.

Even on a purely limited question of "jurisdiction to tax," no prior opinion, state or federal, has ever discussed the question of whether the Public Salary Tax Act in removing state tax immunity from federal salaries, ever intended that performance of duty by federal employees, standing entirely apart from any other possible basis of jurisdiction, was a permissible ground for the exercise of state tax jurisdiction.

Prescinding from the gross injustice involved, discussed later, the consequences of such construction to the operations of the federal government are staggering: Any federal officer or employee who performs any of his official duties within a State may be required to report such fact to the State together with such information as it may require to evaluate the time spent in the State, earnings, and expenses while so engaged. The federal officer or employee may then be required to pay a percentage of such earnings to the locality. It might be said that the locality might not chose to arrest, fine and imprison some high ranking federal official who failed to comply, or that it

might overlook the performance of duties that only involve a relatively short period of time within the locality. But such a congeniality is not to be relied upon. The history of our country is replete with localism, and there are numerous examples of local hostility to federal officers in our time. If the principle of taxing federal operations is accepted in this sphere it is applicable to the high and the low, the short and the long.

Mr. Justice Holmes summed up the importance of this question in *Johnson* v. *Maryland*, 254 U.S. 51, 55, where, in rejecting an attempt to fine a federal employee for failure to obtain a state driver's license to operate a government vehicle, he said:

> "Here the question is whether the state can interrupt the acts of the general government itself."

**2b. Federal Territory.** The principle of the decision below, applied to areas near at hand, would result in residents of Virginia being taxed by Maryland for the privilege of working in the District of Columbia, and in default, being arrested and imprisoned in the District by Maryland authorities. However shocking this may be to Virginia residents working in the District of Columbia, it is not the less shocking to New Jersey residents working on League Island. Nor is this a loose analogy.

Federal jurisdiction over the District of Columbia and League Island was acquired in the same way. The method is set out in Article I, Section 8, Clause 17 of the Constitution. The quantum of jurisdiction thereby acquired over places such as League Island is expressly, "like Authority" as Congress exercises over the District of Columbia. Geographically, the analogy

is also complete. League Island, like the District of Columbia, is situated on a navigable river forming the boundary between two States. In going to and from his employment on League Island, petitioner travels by special ferry direct from the New Jersey shore, and does not enter Pennsylvania any more than Virginia residents enter Maryland in crossing the Potomac River by bridge. The only place where the analogy breaks down is that Congress has legislated extensively for the District of Columbia, but other areas under the exclusive jurisdiction of the United States have been treated somewhat like stepchildren in this regard.[6] But this is a matter of degree only, for it would not be expected that sovereignty is to be lost by the manner in which it is exercised.

The Buck Act does not except the District of Columbia from its provisions. Of course, if Congress by the Buck Act abondoned its exclusive jurisdiction or suspended it in some way as by giving Federal Areas

[6] An example, significant here, concerns extradition. In the District of Columbia, a judge of the United States District Court sits as the chief executive for the area to protect the rights of the person sought to be extradited (D. C. Code, 1951 Ed., Sect. 23-401, 402, 31 Stat. 1340, amended, 67 Stat. 106). Extradition in areas other than the District is usually controlled by a reservation in the act of cession, permitting the execution of state civil and criminal process within the ceded lands. Such reservations have been construed as in the nature of extradition agreements between sovereigns: state process is *quoad hoc* federal process, and may be executed only "for acts done within and cognizable by the State," the State having no "right to punish for acts done within the ceded lands." *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U. S. 525, 534. However, since there is no chief executive officer within areas such as League Island, the only protection of the individual in such matters is entrusted to the hands of the United States District Court for the area upon petition for habeas corpus. *In re Ladd*, 74 Fed. 31, *Ex Parte Tatem*, 23 Fed. Cas. 708, No. 13759.

over to private use, the analogy would be destroyed.[7] But 4 U.S.C. 108 expressly provided that the Buck Act was not to be so construed, and at all times since its acquisition almost one hundred years ago, League Island "has been used by the United States solely and exclusively as a shipyard for building, servicing, and maintaining ships of war and other vessels and equipment of the United States Navy." (R. 3a). One of the express purposes of this section retaining exclusive jurisdiction over federal areas was to prevent a sharing of federal penal jurisdiction in such areas. (Senate Report 1625, 76th Congress, 3d Sess.)

The Buck Act grew out of the changed understanding of the concept of immunity expressed just the previous year in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 and the Public Salary Tax Act. Before 1939 it was thought that a federal employee, although otherwise subject to local taxation of his income as in the case of either a domiciliary or resident, was nevertheless relieved of the tax on that part of his income received as salary from the federal government. Although it would seem implicit after 1939 that immunity would not exist with respect to a salary earned within a federal area, nevertheless such questions were raised in both Maryland and Pennsylvania after *O'Keefe* but before the Buck Act.[8]

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[7] *Offutt Housing Company* v. *County of Sarpy*, 351 U.S. 253.

[8] *Wood* v. *Tawes*, 28 A2d 850 (Maryland, salary earned in D. C.). *Philadelphia* v. *Schaller*, 25 A2d 406 (Pennsylvania, salary earned on League Island). The Pennsylvania court thought that the Buck Act was merely declaratory of *O'Keefe*. Later in *Kiker* v. *Philadelphia*, 31 A2d 289, at page 297, the court could not conceive of Congress passing such an act merely declaratory of existing law.

The construction of the courts below[9] is that Congress retained jurisdiction in every aspect save one: territorial taxing jurisdiction. This construction leads to an absurdity: a taxing power without sovereignty. It completes the analogy announced at the outset: Maryland authorities arresting Virginia residents in the District of Columbia because they worked in the District of Columbia and failed to pay a Maryland tax.

**3. 4th and 5th Amendments.** Reliance for imposing fine and imprisonment here stems entirely from federal statutes. This is more than a case of the federal "thumb on the scales" (*P.U.C.* v. *Pollak*, 343 U.S. 451, 461-462), and if the construction of these statutes by the court below be correct, a question of their validity arises. Such construction presents the aspect of federal consent to the exercise of state power to tax and imprison with respect to functions and territories as to which the State possesses no other attribute of sovereignty.

The United States does not permit state control over the activities of its employees even in so grave a matter as murder or in so slight a matter as a driver's license. By what right therefore, can the State make this same activity the sole basis for exercising jurisdiction to tax, to fine, arrest and imprison? This is

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[9] Pennsylvania decisions concerning the Buck Act fail to bear out respondent's claim of uniformity. They reflect state territorial claims for tax purposes, and extraterritoriality for all other purposes. Recently *Schwartz* v. *O'Hara Twp. School District*, 375 Pa. 440 denied residents of a federal area the right to attend public schools, because the area was under the exclusive jurisdiction of the United States. Questions of this character and those referred to in note 6 *supra* have prompted recent studies. See report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, GPO, Part I, 1956, Part II, 1957.

certainly a one-way sovereignty. It is not warranted by the opinion of this court in *Graves* v. *New York ex rel O'Keefe*, 306 U.S. 466, for that case involved a resident of the taxing state, and held that federal employees should not be relieved "from contributing their share of the financial support of the other government, whose benefits they enjoy. * * *" (pg. 483). The legal arithmetic in adding to this case, cases such as *Shaffer* v. *Carter*, 252 U.S. 37, upholding taxes on non-residents deriving income from private business activity within the taxing state, will not do. This is adding apples and oranges. Respecting private employment, local government exercises jurisdiction over the activities of both the employer and the employee as well as the relationship between them. But respecting federal employment, local government does not and cannot exercise any jurisdiction of the activity of the employer or the employee or the relationship between them. Philadelphia confers no "benefit" on these employees in respect to their activities as federal employees. Any attempt to do so would be a prohibited interference with the federal government. Incidental advantages enjoyed by anyone who happens to be in or near Philadelphia are not the subject of taxation, and irrelevant, for the "benefit" must refer to the event upon which the tax is incident. *Spector Motor Services Inc.* v. *O'Connor*, 340 U.S. 602, 607-608.

This is not simply a matter of confiscation as would be the case of a taxing power without jurisdiction. It is far more serious. It is the taking of the very body of the individual without due process, and an arbitrary arrest and imprisonment in violation of the Fourth and Fifth Amendments.

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that his petition for certiorari be granted.

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## APPENDIX A

### Statutes Involved

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clause 17:

"[Congress shall have power] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *"

Amendment 4.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5.

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

PUBLIC SALARY TAX ACT (Portions of the Act of April 12, 1939, 53 Stat. 575)

United States Code, 1952 edition, Title 5, Section:

"84a. *Consent of United States to taxation of compensation of officers and employees of United States, Territories,* etc. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more

of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such conmpesation, if such taxation does not discriminate against such officer or employee because of the source of such compensation."

BUCK ACT (Portions of Act of October 9, 1940, 54 Stat. 1059)

United States Code, 1952 Edition, title 4, Sections—

"106. *Same; income tax.*—(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"108. *Same; jurisdiction of United States over Federal areas unaffected.*—The provisions of sections 105-110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

"110. *Same; definitions* • • •

"(e) The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State."

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,499

UNITED STATES ex rel. GEORGE E. THOMPSON, *Appellant*,

v.

WILLIAM LENNOX, Sheriff of the City of Philadelphia

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued May 12, 1958

Before KALODNER, STALEY and HASTIE, *Circuit Judges*

**Opinion of the Court**

(Filed July 18, 1958)

PER CURIAM

Two issues are presented by this appeal from the Order of the District Court dismissing petition for a writ of habeas corpus, filed by a resident of New Jersey who is a civilian employee at the Philadelphia Naval Shipyard, following his seizure by the Sheriff of Philadelphia, pursuant to a writ of capias ad respondendum issued by the Municipal Court of Philadelphia, Pennsylvania to recover fines and penalties for failure to file a return and to pay the Philadelphia wage tax.

The District Court premised its dismissal of the petition for the writ on these grounds: (1) a federal court should not exercise its discretion to grant a writ of habeas corpus to free a person held in State custody where such person has not exhausted available State court remedies; and (2) Philadelphia has jurisdiction to impose its wage tax on the earnings of a non-resident federal employee at the Philadelphia Naval Shipyard.

Due consideration has been given to briefs of the parties and those filed by the State of New Jersey and the Senate of New Jersey as amicus curiae.

We are of the view that the District Court did not err and that no useful purpose will be served by elaborating upon its well-reasoned and adequate disposition.

The Order of the District Court will be affirmed upon the opinion of Judge Van Dusen, 157 F. Supp. 93 (E.D. Pa. 1957). Cf. Kiker v. Philadelphia, 346 Pa. 624 (1943), cert. den. 320 U.S. 741; Philadelphia v. Cline, 158 Pa. Super. 179 (1945), cert. den. sub nom. Barnes v Philadelphia, 328 U.S. 848 (1946).

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Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

**Judgment**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

HARRIET G. HUMPHRYS
*Chief Deputy Clerk*

July 18, 1958

**Sur Petition for Rehearing**

Present: McLaughlin, Kalodner, Staley and Hastie, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied

Judge McLaughlin votes to grant the petition.

By the Court

Kalodner
*Circuit Judge*

Dated: September 17, 1958

FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES, EX REL. GEORGE E. THOMPSON,
*Petitioner,*

*v.*

WILLIAM LENNOX, Sheriff of Philadelphia,
*Respondent*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## INDEX


| | Page |
|---|---|
| Constitutional Provisions and Statutes Involved | 2 |
| Counter-Statement of Questions Presented | 2 |
| Counter-Statement of the Case | 3 |
| Argument | 4 |
| 1. Habeas Corpus | 7 |
| 2. Federal Function and Federal Territory | 10 |
| 3. Fourth and Fifth Amendment Questions | 13 |
| Conclusion | 15 |
| Appendix—Text of Constitutional Provisions and Statutes Involved | 17 |


## TABLE OF CITATIONS


*Cases:*

| | |
|---|---|
| Baker v. Grice, 169 U. S. 284, 42 L. ed. 748 (1898) | 6, 8 |
| Barnes v. Philadelphia, 328 U. S. 848, 90 L. ed. 1621 (1946) | 5 |
| Darr v. Burford, 339 U. S. 200, 94 L. ed. 761 (1950) | 6, 8 |
| Ex Parte Hawk, 321 U. S. 114, 88 L. ed. 572 (1944) | 6 |
| Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 83 L. ed. 927 (1939) | 7 |
| Guerra v. Phila., 30 F. Supp. 791 (E. D. Pa., 1940) | 4 |
| Hacker v. Jerrett, 3 Binn. 403 (Pa. Supreme Court, 1811) | 9 |
| House v. Mayo, 324 U. S. 42, 89 L. ed. 739 (1945) | 6 |
| Howard v. Commissioners of Louisville, 344 U. S. 624, 97 L. ed. 617 (1953) | 6, 12 |

## TABLE OF CITATIONS—*Continued*


*Cases:* Page

In re Neagle, 135 U. S. 1, 34 L. ed. 55 (1890) 7

Kiker v. Phila., 346 Pa. 624, 31 A. 2d 289 (1943), cert. denied 320 U. S. 741, 88 L. ed. 439 (1943) 4-5, 9

Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791 (1935) 6

New York v. Eno, 155 U. S. 89, 39 L. ed. 80 (1894) 6, 8

Phila. v. Cline, 158 Pa. Superior Ct. 179, 44 A. 2d 610 (1945), cert. denied sub nom. Barnes v. Phila., 328 U. S. 848, 90 L. ed. 1621 (1946) 5, 9

U. S. ex rel. Kennedy v. Tyler, 269 U. S. 13, 70 L. ed. 138 (1925) 6

*Other Citations:*

Buck Act, Act of October 9, 1940, 55 Stat. 1060, 4 U. S. C. A. §106 6, 7-8, 15

Federal Habeas Corpus Act, Act of June 25, 1948, 62 Stat. 965, 28 U. S. C. A. §§2243 9

Public Salaries Taxing Act, Act of April 12, 1939, 53 Stat. 573, 5 U. S. C. A. §84(a) 6, 7, 15

Pennsylvania Habeas Corpus Act, Act of February 18, 1875, 2 Sm. L. 275, 12 P.S. §§1871-1891 9

Revised Rules of the Supreme Court of the United States, Rules 16.1(b), 19(b) 5, 12

Senate Miscellaneous Reports II, 76 Cong., 3d Session, Report 1625, p. 3 11-12

IN THE

# Supreme Court of the United States

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## OCTOBER TERM, 1958

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UNITED STATES, EX REL. GEORGE E. THOMPSON,
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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent, William Lennox, Sheriff of Philadelphia, prays that a writ of certiorari not be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 18, 1958.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes cited by petitioner on page 3 of his brief, there are here involved pertinent sections of the Philadelphia Income Tax Ordinance of December 13, 1939, Code of General Ordinances of the City of Philadelphia, §§19-508, 1502, 1503; the Federal Habeas Corpus Act, Act of June 25, 1948, 62 Stat. 965, 28 U.S.C.A. §2254; the Act of Cession of April 4, 1866, P.L. 96, 74 P.S. §1, note; the Pennsylvania Habeas Corpus Act, Act of February 18, 1875, 2 Sm. L. 275, 12 P.S. §§1871, 1873, 1888, the relevant portions of which are set out verbatim in the Appendix, infra, pp. 17-22.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. May a civilian employee of the Philadelphia Navy Yard, a federal area completely within the geographical limits of the City of Philadelphia, who has been subjected to a civil arrest for failure to file returns and pay taxes required under a non-discriminatory Philadelphia Income Tax Ordinance, challenge the validity of the Ordinance or its application to him by means of a writ of habeas corpus filed in the United States District Court where:

(a) He has not exhausted or attempted to exhaust his remedies in the State courts; and

(b) His remedies in the State courts are adequate as a matter of law?

II. Does the City of Philadelphia have the power to impose a non-discriminatory wage tax on the salary of a non-resident earned for services performed in a Federal area within the territorial limits of the City?

## COUNTER-STATEMENT OF THE CASE

On October 9, 1957, an affidavit to hold to bail was filed by the City of Philadelphia, setting forth that petitioner failed to file the return or pay the tax required by the Philadelphia Income Tax Ordinance for the years 1950-1956 inclusive, and that as a result the City was entitled to recover fines of $100.00 for each of these years (R. 6a-8a). A writ of capias ad respondendum was issued on the same day by the Municipal Court of Philadelphia, directing the Sheriff to take petitioner in custody, and if he refused to post bail, to hold him until hearing on the City's action to collect the fines due. The hearing was set for the first Monday of November. 1957.

With the consent of the appropriate federal authorities at the Naval Shipyard (R. 22a) and pursuant to the Act of Cession of April 4, 1866, P.L. 96, §1 note, permitting all State process to extend into the Navy Yard, the Sheriff took petitioner into custody at the Philadelphia Navy Yard.

It is not a fact that petitioner was imprisoned. By prior arrangement with the District Court and with counsel, he was brought immediately to the Federal District Court for the Eastern District of Pennsylvania, pursuant to an order of that Court granting a writ of habeas corpus for the purpose of testifying only (R. 13a). There argument was held on the petition for the writ of habeas corpus, and petitioner was released in the custody of his attorney, pending a hearing and the court's ruling on the legal questions raised. He has remained at liberty in the custody of his attorney ever since (R. 23a).

The City filed a motion to dismiss the petition, and a hearing was held at which petitioner was given an opportunity to produce evidence in support of his petition, but did not offer any testimony or other evidence (R. 23a). The City's motion to dismiss was granted on the grounds that a Federal Court should not grant a writ of habeas corpus to release a person held in State custody until he has ex-

hausted his remedies in the State courts and that, in any event, the City of Philadelphia had justification to impose its wage tax on petitioner's earnings from employment at the Navy Yard and could enforce this right by a writ of capias ad respondendum and fine for failure to pay the tax (R. 14a, 17a, 19a and 21a).

Thereafter, on December 9, 1957, certificate of probable cause for appeal was granted, even though the hearing judge believed "that the application for Writ of Habeas Corpus at this time is premature" (R. 24a).

The Court of Appeals for the Third Circut, after argument, affirmed the decision of the District Court in a per curiam decision, which adopted the opinion of the District Judge. Petition for re-hearing and for hearing en banc was denied by a three to one vote.

## ARGUMENT

This case represents the most recent effort on the part of non-resident employees of the Philadelphia Naval Shipyard to avoid payment of the Philadelphia Income Tax. The efforts began with the enactment of the Philadelphia Income Tax Ordinance of 1939. Since then, federal employees situated similarly to the present petitioner have unsuccessfully attacked the Ordinance in a series of suits.

Thus in *Guerra v. Philadelphia*, 30 F. Supp. 791 (E. D. Pa. 1940), non-resident employees of the Navy Yard sought unsuccessfully to enjoin collection of the tax in the Federal District Court.

In *Kiker v. Philadelphia*, 346 Pa. 624, 31 A. 2d 289 (1943), Federal employees again attempted to defeat collection of the tax by instituting a suit in State court to enjoin enforcement of the Ordinance against them. They raised substantially the same questions raised by the present petitioner. Their effort was unsuccessful and their peti-

tion for certiorari was denied, 320 U. S. 741, 88 L. ed. 439 (1943).

When Federal employees, particularly those working at the Philadelphia Navy Yard, continued to resist payment of the tax, the City proceeded by writ of capias ad respondenum to collect the fine imposed for failure to pay the tax. This is the same procedure used in the present case. The right of the City to impose the tax and to enforce it in this manner was upheld in *Philadelphia v. Cline*, 158 Pa. Superior Ct. 179, 44 A. 2d 610, and again the taxpayer's petition for certiorari was denied, sub nom. *Barnes v. Philadelphia*, 328 U. S. 848, 90 L. ed. 1621 (1946). In both *Barnes* and *Kiker*, supra, the petitions for certiorari presented almost identical questions as are being presented in the instant case.

When one reviews the problems raised by this case in the light of the rules of this Court relating to the granting of a petition for a writ of certiorari to review a decision of a Court of Appeals, it is apparent that none of the reasons which have traditionally moved this Court to grant such petitions are here present. Petitioner does not suggest that there is any conflict between the decision of the Third Circuit in this case and the decision of any other Court of Appeals in a similar case. Nor can the petitioners assert that the ruling of the Third Circuit in this case is in conflict with any applicable State law, because this holding is squarely consonant with all of the decisions of the Pennsylvania Appellate Courts in similar cases. See *Kiker v. Philadelphia*, supra; *Philadelphia v. Cline*, supra.

Petitioner attempts to liken this case to a decision of a Court of Appeal which has decided "an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a

lower court as to call for an exercise of this Court's power of supervision." *Revised Rules of the Supreme Court of the United States*, Rule 19(b).

When one considers what the Court of Appeals actually decided in this case in terms of the above tests, it is apparent that the decision here sought to be reviewed does not fit into any of the above categories. Certainly, the decision of the Court of Appeals in denying the writ of habeas corpus for failure to exhaust applicable State remedies is clearly in harmony with a host of decisions of this Court on the same subject matter. *Darr v. Burford*, 339 U. S. 200, 94 L. ed. 761 (1950); *House v. Mayo*, 324 U. S. 42, 89 L. ed. 739 (1945); *Ex Parte Hawk*, 321 U. S. 114, 88 L. ed. 572 (1944); *Mooney v. Holohan*, 294 U. S. 103, 79 L. ed. 791 (1935); *U. S., ex rel. Kennedy, v. Tyler*, 269 U. S. 13, 70 L. ed. 138 (1925); *New York v. Eno*. 155 U. S. 89, 39 L. ed. 80 (1894); *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748 (1898).

The decision of the Court of Appeals for the Third Circuit on the merits, i.e. that petitioner is subject to the tax, is consonant not only with a decision of this Court in a comparable case, *Howard v. Commissioners of Louisville*, 344 U. S. 624, 97 L. ed. 617 (1953), but is also the only rational decision which could be made in light of the Public Salary Tax Act, Act of April 12, 1939, 53 Stat. 573, 5 U.S.C.A. §84(a), and the Buck Act, Act of October 9, 1940, 55 Stat. 1060, 4 U.S.C.A. §106. For these reasons, it is submitted that this Court should not grant the petition.

In seeking to avoid the obvious fact that this case presents no novel or difficult question which requires review by this Court, petitioner has verbalized issues which are not fairly raised by the facts of the case and which were not decided by either the District Court or the Court of Appeals. A brief analysis of the reasons advanced by petitioner in support of the application for the writ will demonstrate that petitioner's arguments are without substance.

1. HABEAS CORPUS.

Petitioner assigns as the first reason for granting the writ that "this is the first case ever to hold that a Federal employee in State custody must exhaust State remedies before raising the claim in a Federal Court that he is in custody for an act done or omitted in pursuance of the laws of the Congress of the United States" (Petitioner's Brief, page 5).

The short answer to this argument is that the District Court found as a matter of fact, that petitioner's refusal to file a return and pay a tax was not "an act done or omitted in pursuance of the laws of the Congress of the United States." This finding of fact by the trial judge disposes of petitioner's argument in this respect. Moreover, the finding of fact was made only after petitioner was given an opportunity to testify or produce evidence but failed to do either. As stated by the District Court, "petitioner's failure to pay his tax was not part of his duties as a civilian employee of the Federal Government . . ." (R. 16a).

Under these circumstances, petitioner's reliance on *In re Neagle*, 135 U. S. 1, 34 L. ed. 55 (1890), is patently misplaced. In *Neagle*, petitioner was taken into State custody as a result of doing the very thing which his Federal duties required him to do. Here, petitioner is in custody not as a result of the performance of his duties as a Federal employee, but because of his failure to comply with an obligation of law which exists independently of his Federal duties and in no way interferes with his performance of them.

Whatever the substantive right of the City to impose a wage tax on a person in petitioner's particular circumstances, the Federal decisions and statutes make it clear that local taxes on the salaries of Federal employees do not constitute a burden on or interference with the Federal activities from which the salary derives. See *Graves v. New York, ex rel. O'Keefe*, 306 U. S. 466, 83 L. ed. 927 (1939). Public Salaries Taxing Act of April 12, 1939, 53 Stat. 575, 5 U.S.C.A. §85(a); and the Buck Act of October 9, 1940, 54

Stat. 1060, 4. U.S.C.A. §106. In this respect, it should be observed that any asserted interference with Federal activities is no different in petitioner's case than it would be if the tax and fine were assessed against a resident of Philadelphia working in the Navy Yard or otherwise federally employed.

Nor does the fact that the obligation to pay taxes is here being enforced by a writ of capias ad respondendum, which results in petitioner's arrest if he refuses to post bail, create an interference with the Federal Government. Petitioner might just as well assert that an arrest for violation of Philadelphia's traffic laws which keeps him from being at work in the Navy Yard is an interference with the Federal Government's activities there. Both cases stand on the same footing. Even if such a traffic arrest were asserted to be in violation of the Federal Constitution plaintiff would still have to exhaust his remedies in the State Courts before seeking a Federal writ of habeas corpus.

In direct contravention of petitioner's assertion that his refusal to comply with the Philadelphia Income Tax Ordinance is an act done in pursuance of the laws of the United States, is the congressional policy expressed in the Public Salary Tax Act and the Buck Act that Federal employees shall comply with the local income tax laws, regardless of whether they are employed in Federal areas. In these circumstances, refusal to grant the writ of habeas corpus was clearly not an error requiring correction on a writ of certiorari. Indeed, the granting of the writ of habeas corpus by the District Court would have constituted an unwarranted interference with State processes. *Darr v. Burford*, supra; *Baker v. Grice*, supra; *New York v. Eno*, supra.

This is especially so where a petitioner fails to offer any proof that there are no remedies available to him under state law. His assertions in the petitions for habeas corpus and for the writ of certiorari that he would be imprisoned in jail for a month unless a Federal writ of habeas corpus

is granted, are without foundation. He has an efficient and speedy means to determine the validity of this custody under the Pennsylvania Habeas Corpus Act, Act of February 18, 1875, 2 Sm. L. 275; 12 P. S. §§1871-1891. Section 1 of the Act, 12 P.S. §1871 makes the writ available to anyone "committed or detained for any criminal or supposed criminal matter" and Section 13, 12 P.S. §1888 extends the remedy to anyone "confined or restrained of his or her liberty under any color or pretense whatsoever." It has long since been decided that under this section the writ extends to one confined under civil process. *Hacker v. Jerrett*, 3 Bin. 403 (Pa. Supreme Court, 1811). The writ may be obtained whether the court is in session or not, 12 P. S. §§1871, 1879, and the judge is charged with "investigating the truth of the circumstances of the case to determine whether according to law the said prisoner ought to be bailed, remanded or discharged." 12 Purdon Statutes §1873. The judge to whom the petition is presented is "authorized and required . . . to award and grant a habeas corpus" upon a showing of detention, 12 P.S. §1871, and the writ must be returned to, and the prisoner brought before the issuing judge within three days of its issue. 12 P.S. §1873. This is the same return period provided for under the Federal act. Act of June 25, 1948, 62 Stat. 965, 28 U.S.C.A. §2243. This remedy is as efficient to determine the validity of petitioner's custody as a Federal writ of habeas corpus.

The effectiveness of the appropriate State remedies to raise the same questions now being presented by petitioner is conclusively demonstrated by the fact that every one of these questions has been raised before in the courts of Pennsylvania. *Kiker v. Philadelphia*, supra; *Philadelphia v. Cline*, supra.

Finally, the District Court found as a fact that petitioner had available to him remedies in State courts which were adequate to protect his rights (R. 16a).

In light of the foregoing, petitioner's assertion that the decision sought to be reviewed presents a novel habeas

corpus question has no substantiation in the facts of this case. In essence this is a case of a person earning income within the geographical limits of Philadelphia who has refused to pay the tax or file the return required by a Philadelphia Income Tax Ordinance, and who attempts to make the incidental fact that the income was earned in a Federal area and paid by the Federal Government, a ground for invoking the aid of a Federal court to defeat and evade the tax.

2a and 2b. FEDERAL FUNCTION AND FEDERAL TERRITORY

Petitioner's second argument is a variation of the first, and proceeds on the same erroneous premise, i.e. that petitioner and other Federal employees are subjected to State process "solely by reason of having performed their [Federal] duties within the State." (Petitioner's Brief, page 9).

The fact is that petitioner is being subjected to State process because of his failure to report and pay a tax on income earned within the geographical limits of the State. The source of the payments to him or the nature of his duties are irrelevant to his obligation to report and pay the tax. Neither the District Court or the Court of Appeals held that he was amenable to State process solely by reason of having performed Federal duties within the State. Rather these Courts properly held that petitioner was subject to State process because he earned income from employment within the geographical boundaries of the taxing authority, and that he was not immune from the levy, collection or enforcement of the tax because of the fact that he was paid by the Federal Government or worked in an area within the "exclusive jurisdiction of the Federal Government."

One need but read the language of the Buck Act to conclude that this result was specifically intended by its framers. The pertinent language is as follows:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly consti-

tuted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

This articulation is so clear that resort to legislative history for interpretation seems hardly necessary, and indeed when that history is consulted, it is specifically stated that the purpose of the Act was to permit local taxation of salaries of Federal employees who worked or resided in areas over which the Federal Government had been given "exclusive jurisdiction" in order to put such employees on the same footing as other Federal employees in respect to local taxation. As stated in the report of the *Finance Subcommittee of the Senate* which drafted the entire Act as it was finally passed:

> "Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. . .
>
> "Another reason for removing the above exemption, is that under the doctrine laid down in *James v. Dravo Contracting Co.*, (302 U. S. 134, 1937), a state may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such in-

come or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction." *Senate Miscellaneous Reports II, 76 Cong., 3rd. Session, Report 1625, p. 3.*

If any doubt remained that the purpose of the Buck Act was to permit local authorities to tax income earned in areas within "exclusive" Federal jurisdiction to the same extent and in the same manner as if the Federal Government did not occupy the area, the decision of this Court in *Howard v. Commissioners of Louisville*, 344 U. S. 623, 97 L. et. 617 (1953), settled the matter. In that case, civilian employees of a Naval ordnance plant over which the Federal Government had exclusive jurisdiction resisted payment of a tax which was imposed on persons who earned income within the city limits of Louisville. In holding that the Federal employees in the Naval ordnance plant were liable to the tax, this Court said:

> "Thus the right is specifically granted to the City of Louisville as a taxing authority of Kentucky to levy and collect a tax measured by the income or earnings of *any* party 'receiving income from transactions occurring or services performed in such area . . . to the same extent and with the same effect as though such area was not a Federal area.' *In other words, Kentucky was free to tax earnings just as if the Federal Government were not there.*" 344 U. S. 624 at 628, 97 L. ed. 617 at 621. (Emphasis supplied).

In view of the above, it is submitted that the immunity here claimed is so specious on its face that had this case arisen by way of an appeal rather than certiorari, the Court would have been entirely justified in granting a motion to dismiss the claim on the ground that it does not present a "substantial federal question." (Revised Rules of the Supreme Court of the United States, Rule 16. 1(b))

### 3. Fourth and Fifth Amendments

Petitioner's argument on this head, to the extent that it differs at all from his preceding premise, appears to be that Philadelphia may not levy and enforce a tax on his income earned for services performed within the Philadelphia Naval Shipyard and paid by the Federal Government because the City "confers no benefit" on him as an employee of the Shipyard. But the "benefits" conferred by the City on employees at the shipyard are the same as those conferred on other non-residents privately employed within the geographical limits of the City.

It is not merely fortuitous that the Naval Shipyard is located in Philadelphia. It is here because the City and Port of Philadelphia provided a suitable industrial and mercantile climate necessary to the operation of a great naval shipyard. The availability in Philadelphia of suppliers and fabricators of materials and a ready pool of skilled labor is just as important to the Philadelphia Naval Shipyard as it is to any other large industry which decides to locate here. A local government which fosters commerce and industry and which promotes and maintains a well-ordered community is as important to the Philadelphia Naval Shipyard and its employees as it is to any other industry within the City's geographical limits. Without these, neither the shipyard or any other industry could thrive and continue to provide the employment opportunities of which petitioner is an obvious beneficiary.

Petitioner's claim that his "contacts" with the City are minimal because he takes a ferry to and from the shipyard and never enters upon the City streets cannot be determinative. If it were, he would have to be accorded different treatment under the Tax Ordinance from his New Jersey neighbor who used a means of transportation which took him over the City streets and called into play a pro-rata portion of the City's police protection. In fact, a great portion of the facilities and services provided by the City

are made necessary by the existence within its limits of the Philadelphia Naval Shipyard. These are as available to the petitioner as to all other employees at the shipyard and are as necessary to the continued existence of petitioner's employment at the shipyard as they are to the employment of the many others who work in Philadelphia, both in and outside of the shipyard.

This same argument was presented by petitioner in the Courts below and was dispositively answered in the opinion of the District Court in the following language:

> "The allegations of the petition that petitioner uses a ferry to cross the Delaware River directly to the Shipyard and that he has no contacts with other parts of Philadelphia do not exempt him from the tax for the reasons stated in *Kiker v. Philadelphia*, supra, at pp. 632-4, where the court said:
>
> 'There is no doubt that after the cession, Philadelphia was obligated to confer all the usual attributes of government—the same as those possessed by residents and citizens of Philadelphia—upon those deriving income from working on League Island; fire and police protection, the right to use all municipal facilities, etc. This obligation can be called into play at any time the national government refuses or neglects to furnish them. . . . The fact that the Federal government . . . does not at this time see fit to take full advantage of the obligation of this Commonwealth, or its political subdivision, the City of Philadelphia, to make available protection and benefits to persons and property on the Island, does not justify our invalidation of the income tax in question, as far as plaintiff and those in a similar position are concerned . . . The reservation is immediately adjacent to Philadelphia; is geographically within its limits; and since December 31, 1940, because of the provisions of Public Act No. 819, is actually part of that City for the purpose

of imposing the tax here under consideration. Plaintiff may at all times use the streets, bridges and other facilities of the City, and also has the benefit of protection of its police and fire departments when engaging in business or pleasure in that municipality, as well as many other advantages. It is common knowledge that the City of Philadelphia cuts all ice, and keeps the Delaware River navigable from the northern limits of the City to Chester, where in the winter months navigation would otherwise be closed, making possible to plaintiff the transportation he uses to go to and return from League Island to his home in New Jersey. This is decidedly a benefit to him . . . Therefore, we are convinced that the tax does not violate the Fourteenth Amendment to the Federal Constitution, that all the benefits of the facilities of Philadelphia are legally available to plaintiff, and he has no just reason to complain of the tax.'" (R. 18a).

As the courts which have passed upon this question before have clearly seen, these cases in essence are attempts by certain employees of an industry which is located wholly in Philadelphia to escape paying any share of the cost of government of the City, without whose existence their employment would surely cease.

## CONCLUSION

Since the decision of the Court of Appeals for the Third Circuit here sought to be reviewed is not in conflict with a decision of another Court of Appeals on the same matter, and is not in conflict with applicable State law, and is harmonious with the decisions of this Court on both the procedural and the substantive questions presented, and is further in harmony with the policy established by Congress in the Public Salaries Tax Act and the Buck Act,

it is respectfully submitted that this Court, in the exercise of its sound judicial discretion may properly refuse to grant the petition for a writ of certiorari.

Respectfully submitted,

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# Appendix

## Statutes Involved

PHILADELPHIA INCOME TAX ORDINANCE (PORTION OF THE ORDINANCE OF DECEMBER 13, 1939, CODE OF GENERAL ORDINANCES OF THE CITY OF PHILADELPHIA, §§19-508, 1502, 1503):

"Imposition of Tax. An annual tax for general revenue purposes of one and one-half per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; and on (c) the net profits earned after January 1, 1939, of business, professions or other activities conducted by such residents, and on (d) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted in Philadelphia by non-residents . . .

"Returns and Payment of Tax. Each person whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 15th of each year, make and file with the Receiver of Taxes a return on a form furnished by or obtainable from the Receiver of Taxes, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Receiver of Taxes may require: Provided, however, That where the return is made for a fiscal year or any other period different from a calendar year, the said return shall be made within seventy-five days from the end of the said fiscal year or other period . . .

"Violations; Penalties. Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Receiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof." (This Ordinance has been amended from time to time to change the rate of the tax. During the periods in question in this case, the rate of the tax was one and one quarter percent.)

THE FEDERAL HABEAS CORPUS ACT (PORTIONS OF THE ACT OF JUNE 25, 1948, 62 STAT. 965, U.S. CODE ANNOTATED, TITLE 28 §2254):

"State custody; remedies in State courts.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

THE ACT OF CESSION (PORTIONS OF THE ACT OF APRIL 4, 1866, P. L. 96, 74 P. S. §1, note):

"SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in order to vest, in the United States of America, the complete title and jurisdiction, for naval and national uses, over all League Island, and its appurtenances, with the water-basin, or channel, between it and the main land, together with the northerly shores thereof, hereinafter mentioned, the consent of this commonwealth is hereby granted to the United States of America, in any manner, to accept, purchase, or acquire title to the same, and particularly to all, and any part of the land situate on the northerly shore of the inland back channel, or water-way, (between the Delaware and Schuylkill rivers,) which now separates, or heretofore divided, League Island from the main land: Provided, That the width, or extent, of the land necessary, or convenient, for the exclusive use, protection and control of the said back channel, or water-basin, and so to be acquired, may be determined, at any time, by, or on behalf of, the secretary of the navy of the United States."

"SECTION 3. Upon the acceptance, by the United States, of the said land, or any part thereof, according to the provisions of any act of Congress, heretofore made, or hereafter to be provided, a certificate, signed by the secretary of the navy of the United States, recorded in the office of the recorder of deeds, in and for the county of Philadelphia, shall be the proper and sufficient evidence of such acceptance; and thereupon, and thereafter, the sovereignty and right to exclusive jurisdiction, over all the said premises, shall be vested in the United States of America: Provided, That nothing herein contained shall be construed to interfere with the service of civil, or criminal, process, within the premises hereinbefore mentioned."

THE PENNSYLVANIA HABEAS CORPUS ACT (PORTIONS OF THE ACT OF FEBRUARY 18, 1875, 2 Sm. L. 275, 12 P.S. §§1871, 1873, 1888):

"Issuing writ.

If any person shall be, or stand committed or detained for any criminal or supposed criminal matter, unless for treason or felony, the species whereof is plainly and fully set forth in the warant of commitment, in vacation time and out of term, it shall and may be lawful to and for the person so committed or detained, or any one on his or her behalf, to appeal or complain to any judge of the supreme court, or to the president of the court of common pleas for the county within which the person is so committed or detained; and such judge or justice, upon a view of the copy or copies of the warrant or warrants of commitment or detainer, or otherwise, upon oath or affirmation legally made, that such copy or copies were denied to be given by the person or persons in whose custody the prisoner is detained, is hereby authorized and required, upon request made in writing by such prisoner, or any person on his or her behalf, attested and subscribed by two witnesses, who were present at the delivery of the same, to award and grant a habeas corpus, under the seal of the court, whereof he shall then be a judge or a justice, to be directed to the person or persons in whose custody the prisoner is detained. returnable immediate before the said judge or justice; and to the intent, and that no officer, sheriff, jailer, keeper or other person, to whom such writ shall be directed, may pretend ignorance of the import thereof, every such writ shall be made in this manner, 'By act of assembly, 1785,' and shall be signed by the judge or justice who awards the same."

"Proceedings upon writ.

And whenever the said writ shall, by any person, be served upon the officer, sheriff, jailer, keeper or other person.

whatsoever, to whom the same shall be directed, by being brought to him, or by being left with any of his under officers or deputies, at the jail or place where the prisoner is detained, he or some of his under officers or deputies shall, within three days after the service thereof, as aforesaid, upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or justice who awarded the writ, and thereon indorsed, not exceeding twelve pence per mile, and upon scurity given, by his own bond, to pay the charges of carrying him back, if he shall be redemanded, and not to escape by the way, make return of such writ, and bring or cause to be brought the body of the prisoner unto or before the judge or justice before whom the said writ is made returnable; and, in case of his absence, before any other of the judges or justices aforesaid; and shall then likewise specifically and fully certify the true cause or causes of the commitment and detainer of the said prisoner, and when he was committed, unless the commitment be in any place beyond the distance of twenty miles from the place where such judge or justice shall be residing, and if beyond the distance of twenty miles, and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days. And thereupon the judge or justice, before whom the prisoner shall be so brought, shall, within two days, discharge the prisoner from imprisonment taking his or her recognizance, with one or more surety or sureties, in any sum, according to his discretion, having regard to the circumstances of the prisoner, and the nature of the offense, for his or her appearance at the next court of oyer and terminer, general jail delivery, or general quarter sessions of or for the county, city or place where the offense was committed, or in such other court where it may be properly cognizable, as the case shall require; and then shall certify the said writ, with the return thereof, and the said recognizances, into the court where such appearance is to be made, unless it shall appear to the said

judge or justice that the party so committed is detained upon legal process, order or warrant for such matter or offenses for which, by the law, the said prisoner is not bailable; and that the said judge or justice may, according to the intent and meaning of this act, be enabled, by investigating the truth of the circumstances of the case, to determine whether, according to law, the said prisoner ought to be bailed, remanded or discharged; the return may, before or after it is filed, by leave of the said judge or justice, be amended, and also suggestions made against it, that thereby material facts may be ascertained."

"Persons illegally confined may have habeas corpus.

All the provisions hereinbefore made for the awarding and granting writs of habeas corpus, and proceeding thereon, in case of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any color or pretense whatsoever; and that upon oath or affirmation made by such person, so confined or restrained, or by any other in his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the persons so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter, a habeas corpus, directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted, in the same manner and under the same penalties, to be recovered from the same persons, as is hereinbefore directed; and the court, judge or justice before whom the party so confined or restrained shall be brought shall, after the return made, proceed in the same manner as is hereinbefore prescribed to examine into the facts relating to the case, and into the cause of such confinement or restraint, and thereupon either bail, remand or discharge the party so brought, as to justice shall appertain."

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Supreme Court, U.S.
NOV 2
Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**No. 522**

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
*Petitioner,*

*vs.*

WILLIAM LENNOX, Sheriff of Philadelphia,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## TABLE OF CONTENTS


PAGE

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT:

*Point I*—The Buck Act did not re-cede the sovereign power to tax but merely removed a supposed immunity ..... 4

*Point II*— The Buck Act if construed to permit the levy of a tax on petitioner's income in the Navy Yard would violate substantive due process of law ..... 8

(a) A state may tax where its substantive law governs the transaction upon which the tax is imposed ..... 10

(b) A state may tax a taxpayer's rights where a provision of its law enhances the value of those rights ..... 11

(c) A state may tax a transaction if its courts are open to the taxpayer and are peculiarly apt for enforcing the rights under the transaction sought to be taxed ..... 11

(d) A state may tax the right of a person where it provides the conditions of an orderly society without which the owner could not acquire the right, etc. ..... 13

(e) A state may not tax tangible personal property stored in another state even though owned by a domiciliary of the taxing state 15

PAGE

*Point III*—The Buck Act is not authority for enforcement of a penalty action, arising out of a tax liability, against a federal employee employed on federal territory and a non-resident of the state or municipality seeking to exact the penalty ..... 16

CONCLUSION ..... 20

## Cases Cited

Alley v. Craig, 97 F. Supp. 576 (D. Me., 1951) ..... 13

Blackstone v. Miller, 188 U. S. 189 (1903) ..... 10

Burlington County v. Martin, 128 N. J. L. 203, 25 A. 2d 17 (Sup. Ct., 1942) ..... 17

Chisholm v. Georgia, 2 U. S. (2 Dall.) 419 (1793) ..... 14

Citizens Bank and Trust Company v. United States, 240 F. 2d 863 (D. C. Cir., 1956), cert. denied, 355 U. S. 825 (1957) ..... 13

Collector v. Day, 78 U. S. (11 Wall.) 113 (1870) ..... 5

Commonwealth, ex rel., Luckett v. Radio Corp., 299 Ky. 44, 184 S. W. 2d 250 (1944) ..... 8, 15

Coosaw Mining Co. v. South Carolina, 144 U. S. 550 (1892) ..... 18

Curry v. McCanless, 307 U. S. 356 (1939) ..... 13

Dobbins v. Commissioners of Erie County, 41 U. S. (16 Pet.) 435 (1842) ..... 5, 7

Fort Leavenworth R.R. Co. v. Lowe, 114 U. S. 525 (1885) ..... 2fn, 20

Frick v. Pennsylvania, 268 U. S. 473 (1925) ..... 9, 15

Graves v. New York, ex rel. O'Keefe, 306 U. S. 466 (1939) ..... 5-7

PAGE

Greenough v. Tax Assessors, 331 U. S. 486 (1947).... 11

Guaranty Trust Co. v. Virginia, 305 U. S. 19 (1938)... 13

Hanson v. Denckla, 78 S. Ct. 1228 (1958)..... 9

Hines v. United States, ex rel., Marsh, 105 F. 2d 85 (D. C. Cir., 1939)..... 13

Howard v. Commissioners of Sinking Fund, 344 U. S. 624 (1953)..... 19

International Harvester Co. v. Kentucky, 234 U. S. 579 (1914)..... 8, 9

International Shoe Co. v. Washington, 326 U. S. 310 (1945) ..... 9

Liberia v. Nee, 10 F. Supp. 336 (N. D. Fla., 1935).... 17

McGee v. International Life Ins. Co., 78 S. Ct. 199 (1957) ..... 9

M'Culloch v. Maryland, 17 U. S. (4 Wheat.) 316 (1819) ..... 5

Miller Brothers Co. v. Maryland, 347 U. S. 340 (1954) .....8, 9, 14, 15

New York, ex rel., Rogers v. Graves, 299 U. S. 401 (1937) ..... 5

O'Byrne v. Mayor and Aldermen, 41 Ga. 331 (1870).. 14

Parrack v. Ford, 68 Ariz. 205, 203 P. 2d 872 (1949)... 18

Paulus v. South Dakota, 58 N. D. 643, 227 N. W. 52 (1929) ..... 14

S. R. A., Inc. v. Minnesota, 327 U. S. 558 (1946)..... 10

State, ex rel., U. S. Sugar Corp. v. Gay, 46 So. 2d 165 (Fla., 1950) ..... 11

State Tax Comm'n v. Aldrich, 316 U. S. 174 (1942).. 10

TABLE OF CONTENTS


PAGE

n v. The Churchwardens, 1 App. Cas. 611 1876)..... 18

Yale & Towne Mfg. Co., 252 U. S. 60 ..... 13

nk v. Illinois, 43 Tenn. (3 Cold.) 325 (1866) 14

ine Workers v. Arkansas Oak Flooring Co., S. 62 (1956)..... 17

tates v. Arredondo, 31 U. S. (6 Pet.) 691 ..... 18

ates v. County of Allegheny, 322 U. S. 174 ..... 10

ates v. Kahriger, 345 U. S. 22 (1953)..... 17

ites v. United States Industrial Alcohol Co., d 97 (4th Cir., 1939)..... 17

School District, 343 Pa. 178, 22 A. 2d 909 ..... 17

v. J. C. Penney Co., 311 U. S. 435 (1940).. 9, 11

n's Christian Ass'n v. Philadelphia, 323 Pa. Atl. 204 (1936)..... 17


**United States Constitution Cited**


sec. 8, cl. 18..... 5


**Statutes Cited**


ril 4, 1866, P.L. 96..... 2, 20

bruary 18, 1867, 14 Stat. 396..... 2

in 1940, 54 Stat. 1059, 4 U. S. C.:

106-10..... 5, 7

Labor Relations Act..... 17

PAGE

Public Salary Tax Act, 53 Stat. 575, 5 U. S. C.:
Sec. 84a ..... 6, 7, 18
12 Purd. Stat., Sec. 257 ..... 3
74 Purd. Stat., Sec. 1, note ..... 2
Revenue Act of 1926 ..... 17
28 U. S. C. (1952):
Sec. 174 ..... 12
Sec. 1346 ..... 12
Sec. 1402 ..... 12
Sec. 1406 ..... 12
Sec. 1491 ..... 12
Sec. 2414 ..... 13
Sec. 2517 ..... 13

**Rules Cited**

Rule 42(4) ..... 3
Rule of Civil Procedure 148f(a)(b)(9) ..... 3, 16fn

**Texts Cited**

91 C. J. S. (1955):
Sec. 177 ..... 12
Cooley, "Constitutional Limitations", 1 (7th Ed., 1919) ..... 14
70 Harv. L. Rev. 350, 363 (1956) ..... 13

IN THE

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OCTOBER TERM, 1958

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**ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## BRIEF OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

### Statement of the Case

The State of New Jersey files this brief as *amicus curiae* in support of the petition of George E. Thompson for a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed an order of the District Court for the Eastern District of Pennsylvania discharging a writ of habeas corpus. The petitioner Thomp-

son is an employee of the federal government at the Philadelphia Navy Yard on League Island. The Navy Yard abuts on the Delaware River immediately across from New Jersey. The petitioner Thompson is a resident and domiciliary of New Jersey. He travels from New Jersey to the Navy Yard on a special ferry and at no time enters the City of Philadelphia, other than the Navy Yard area, in the course of his employment or in travelling between his home in New Jersey and League Island.

The Navy Yard area was ceded to the federal government by the Commonwealth of Pennsylvania. Act of April 4, 1866, P.L. 96; 74 Purd. Stat., §1, note. Congress authorized the acceptance of exclusive jurisdiction over League Island by Act of February 18, 1867, 14 Stat. 396. Pennsylvania ceded League Island to the United States with the single reservation that "all process, civil and criminal of the Commonwealth of Pennsylvania shall extend into, and be effectual within the territory hereby ceded, as if this law had been not passed."* Today the Philadelphia Navy Yard is a complex of naval facilities controlled exclusively by the federal government, with the single exception of the authority reserved to Pennsylvania to serve civil and criminal process.

The City of Philadelphia by ordinance imposes a tax on income earned by all persons employed in Philadelphia and without regard to the state of their domicile. The penalty section of the ordinance provides that any person who fails or refuses to file a return or to pay the tax is

---

* In *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U. S. 525 (1885), the Supreme Court of the United States, in explaining the meaning of a reservation such as this, indicated, "'It provides only that civil and criminal process issued under the authority of the state, which must, of course, be for acts done within and cognizable by the state, may be executed within the ceded lands, notwithstanding the cession.'" At 534.

subject to maximum penalties of $500.00 and 90 days' imprisonment for each offense. The civil process for arrest in penalty actions is by writ of *capias ad respondendum*. 12 Purd. Stat. §257. The petitioner Thompson filed no tax returns for the years 1950 to 1956. On October 9, 1957, the Sheriff of Philadelphia executed a *capias* against the petitioner within the confines of the Navy Yard, thus initiating a penalty action for $100.00 per year or a total of $700.00 in the Municipal Court of Philadelphia. Pennsylvania law forbids resort to the process of arrest to initiate an action of debt for the tax itself. Rule of Civil Procedure 1481 (a), (b) (9). On October 9, 1957 the petitioner filed a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. On the same day Judge VAN DUSEN granted the writ and admitted the petitioner to bail. Before hearing, the Sheriff moved to dismiss the writ and on December 9, 1957 this motion was granted. On July 18, 1958 the United States Court of Appeals for the Third Circuit affirmed this action on the opinion below.

Thompson has petitioned this Court for a writ of certiorari to the Court of Appeals. The State of New Jersey submits this brief in accordance with Rule 42(4) in support of the petition in order that the right of approximately 2,000 similarly situated residents of New Jersey to be free of the illegal and perhaps unconstitutional tax and enforcement measures sought to be imposed by the City of Philadelphia may be vindicated.

## Summary of Argument

The Buck Act was not a grant by Congress to states and their subdivisions of an affirmative power to tax income earned in federal enclaves. It merely removed a supposed immunity attaching to such income which frustrated otherwise existent power to tax. That this supposition had vitality at the time of the passage of the Buck Act is demonstrable from prior legal history.

The Buck Act should not be construed to authorize any state or its subdivisions to impose a tax on persons or activities with whom it has no contact warranting the imposition of tax. Such a construction would violate substantive due process of law.

The construction of the Buck Act urged by Philadelphia is in diminution of the sovereignty which the United States enjoyed with respect to the Philadelphia Navy Yard prior to the passage of the act. Such statutes should be strictly construed.

Even if the Buck Act grants Philadelphia the power to impose the tax here sought to be collected, which the State of New Jersey denies, it does not authorize it to resort to the collection methods employed here. The act authorizes only collection of an income tax. The petitioner here was arrested by the Sheriff of Philadelphia in the Navy Yard as process to initiate an action for a penalty for non-payment of the tax. The penalty is not commensurate with the tax purportedly due and its payment would not discharge any obligation to pay the tax.

## *ARGUMENT*

### POINT I

### The Buck Act did not re-cede the sovereign power to tax but merely removed a supposed immunity.

The Buck Act was not a grant by Congress to states and their subdivisions of an affirmative power to tax income earned in federal enclaves. It merely removed a supposed immunity attaching to such income which frustrated otherwise existent power to tax. That this supposition had vitality at the time of the passage of the Buck Act is demonstrable from prior legal history.

The principle of law that the United States and the several States could not tax the income of employees of each

other who were engaged in carrying out "governmental" functions was accepted during almost a century before the passage of the Buck Act in 1940, 54 Stat. 1059, 4 U. S. C., §§106-10. *Dobbins* v. *Commissioners of Erie County*, 41 U. S. (16 Pet.) 435 (1842); *Collector* v. *Day*, 78 U. S. (11 Wall.) 113 (1870); *cf. M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316 (1819).

That such employees of the United States were "immune" from state income taxation was reiterated as recently as 1937. *New York, ex rel. Rogers* v. *Graves*, 299 U. S. 401 (1937). However, only two years later this Court overruled this settled doctrine. *Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466 (1939). There this Court put the reason underlying any immunity of the state and national governments from taxation by each other thus: "[T]he limitation on the taxing power of each [is] such as to forestall undue interference * * * with the governmental activities of the other." 306 U. S. at 477. It found that the tax sought to be imposed by New York on the salary of an employee of the United States after that salary had already been paid into the hands of the employee was so insubstantial an interference with the governmental activity of the United States as not to warrant the denial of New York's power to tax its resident. But in assessing the immunity attaching to *federal* employees, the Court recognized that it did not stem exclusively from constitutional principles implied from the co-existence of the two sovereignties, state and national. Under the "necessary and proper" clause, U. S. Const. Art. I, sec. 8, cl. 18, Congress might grant immunity from state taxation to facilitate federal activities. But Congress had not yet spoken. Recognizing that an affirmative inference may sometimes be drawn from silence, the Court nevertheless concluded that a grant by Congress of an immunity from state taxation was not to be inferred where the interference with the ac-

tivity of the national government was an insubstantial economic burden.

Congress ratified this judgment in the Public Salary Tax Act, 53 Stat. 575, 5 U. S. C. §84a, the same year. Neither this act nor the Court in the *O'Keefe* case treated the question of whether an attempt by the state to exercise taxing jurisdiction over activities occurring within a federal reservation, which it might have in the absence of any immunity (the most typical case of which is taxation of the income of its domiciliaries), would be such an interference with the governmental activity of the United States as to confer upon the federal employees an immunity. There are two expressions in the *O'Keefe* case which afford a basis for such an argument. In commenting on the effect of the "interference" with the activities of the national government caused by the state tax there involved, the Court said that it was "but the normal incident of the organization within *the same territory of two governments*, each possessing the taxing power." (Emphasis added.) 306 U. S. at 487. In a concurring opinion, Justice FRANKFURTER said, "Since two governments have *authority within the same territory*, neither through its power to tax can be allowed to cripple the operations of the other." (Emphasis added.) 306 U. S. at 488. While it may not have been the intention of the Court to imply that there would be a different answer to the question of whether the federal employee was immune, depending upon whether the imposition of tax impinged at all upon the exercise of exclusive territorial jurisdiction of the United States, nevertheless the question was thought by some to have remained open. (Petition, p. 13, n. 8.) The silence of Congress might lead to a different inference than in the *O'Keefe* case, where the only interference with a federal activity was a debatable increase in the cost of federal labor.

To prevent possible incorrect inferences of its intent from silence, Congress passed the Buck Act in 1940, deny-

ing or removing any immunity which might be thought to arise from the bare fact that an activity occurred on a federal reservation, just as in 1939 it had passed the Public Salary Tax Act to validate what the Court had said generally in the *O'Keefe* case, that there was no blanket immunity attaching to federal employees. Both acts are addressed to "any duly constituted taxing authority having jurisdiction." They presuppose jurisdiction to tax (absent an immunity) but do not confer it. The Buck Act states: "No person shall be relieved from liability from any income tax * * * by reason of * * * receiving income from * * * services performed in [a federal] area." 4 U. S. C. §106. The second half of this section in elaboration provides that a state shall have jurisdiction to tax "to the same extent * * * as though [the] area was not a federal area." The section does not say, as it might have, that the state shall have the same power to tax as Congress would have. What the language clearly intends is that Pennsylvania shall have as much power to tax the income of employees working on federal reservations within Pennsylvania as it would have to tax domiciliaries or any other persons over whom it might have jurisdiction who earn income in Delaware. That the second half of the section may be somewhat redundant presents no construction difficulty in the context of the confusion incident to the overruling in the *O'Keefe* case of the very well established precedent of the *Dobbins* v. *Commissioners* line of cases. The Buck Act and the Public Salary Tax Act were adopted to set doubts at rest. Some redundancy is a frequent concomitant of such attempts.

Thus the Buck Act, according to its language and purpose and the legal history leading to its passage, did not confer any jurisdiction to tax nor create any taxable incident cognizable by a state where such did not otherwise exist. Indeed, any such attempt by Congress would raise

most serious constitutional problems. It merely denied or removed an immunity which was frustrating the exercise by the several States of any pre-existing jurisdiction or cognizance of an otherwise taxable incident by states.

## POINT II

**The Buck Act if construed to permit the levy of a tax on petitioner's income in the Navy Yard would violate substantive due process of law.**

The Buck Act cannot authorize Philadelphia or Pennsylvania to levy a tax without an adequate constitutional basis. Such a construction of the Buck Act making it unconstitutional must be avoided. It is one thing to legislate that the federal government in its sovereign capacity has no objection to a tax; it is quite another to extend the taxing power of the states or municipalities beyond constitutional limits. There must be an adequate basis for state or municipal taxation or the tax will be violative of the safeguards of substantive due process of law. See *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954); *cf. Commonwealth, ex. rel., Luckett* v. *Radio Corp.*, 299 Ky. 44, 184 S. W. 2d 250 (1944).

In this case neither Pennsylvania nor Philadelphia render the petitioner any benefits or services whatsoever. See discussion, *infra*, paragraph (d).

The vast quantum of litigation concerning state jurisdiction to tax despite a claimed exemption because of some foreign connection has led to a development analogous to that in the area of state power to compel foreigners to submit to the jurisdiction of its courts. Today this Court decides the validity of the "jurisdictional grasp" on foreigners not artificially but by weighing the conveniences to the state against the inconveniences to the litigant. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S.

579 (1914), with *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and *McGee* v. *International Life Ins. Co.*, 78 S. Ct. 199 (1957).

Similarly, in the field of state jurisdiction to tax, the test has become the reasonableness of the imposition of the tax. Compare *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925), with *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954). *Cf. Hanson* v. *Denckla*, 78 S. Ct. 1228 (1958). In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). Justice FRANKFURTER stated the law to be as follows:

> "The state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax, the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * *. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution * * *. [T]he sole constitutional test for a case like the present one * * * is whether property was taken without due process of law, or * * * whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

The rationale that the burden of taxation may fall on the recipients of its benefits is indisputable. Schools, police protection, sewage disposal and street maintenance are obvious benefits. In the difficult fringe cases courts have searched so as not to overlook remote but constitutionally adequate benefits which justify the exercise of the sovereign power to tax.

None of the authorities may be invoked to sustain the tax before this Court. The following analysis of the remotest as well as the most obvious benefits shows that every possible tie between the petitioner and Philadelphia or Pennsylvania is illusory.

**(a) A state may tax where its substantive law governs the transaction upon which the tax is imposed.**

*Blackstone* v. *Miller*, 188 U. S. 189 (1903).

In that case New York was permitted to tax the transfer of a debt on the ground that the validity of the transfer depended on the law of New York. In *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174 (1942), the Court held that Utah could tax the transfer of shares of stock owned by a nonresident in a domestic corporation since Utah law determined the rights represented by the shares of stock though neither the certificates nor the stock transfer records were kept in Utah.

But in the present case, federal law exclusively governs the employment relationship between the petitioner and the Navy. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946). In that case the United States had sold an unneeded post office building and had retained legal title for a certain period to insure performance of contractual obligations by the buyer. With the title in this condition, Minnesota sought to tax the property on the ground that under its law the purchaser had title. This Court found it necessary to ascertain the effect of this contract and held that:

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this court," 327 U. S. at 564.

See also *United States* v. *County of Allegheny*, 322 U. S. 174 (1944) (collecting cases).

**(b) A state may tax a taxpayer's rights where a provision of its law enhances the value of those rights.**

*State, ex rel., U. S. Sugar Corp.* v. *Gay*, 46 So. 2d 165, 168 (Fla. 1950).

In this case the court sustained the imposition by Florida of a tax on a note of a New York corporation secured by a mortgage on Florida lands. Applying the approach which Justice FRANKFURTER had called for in the *Penney* case, *supra*, the Florida court said:

> "It is obvious that the record of a mortgage * * * becomes the generating source of important and definite accessions to the obligation secured thereby. In fact, we think it may be fairly said that the transaction in the instant case would not have been entered into without the security afforded by the mortgage on Florida realty and the protection afforded by their recording statutes * * * relating to the rights of a mortgagee."

In the present case there has been no suggestion of an enhancement of the value of any right or property of the petitioner as a result of the operation of Pennsylvania or Philadelphia law.

**(c) A state may tax a transaction if its courts are open to the taxpayer and are peculiarly apt for enforcing the rights under the transaction sought to be taxed.**

*Greenough* v. *Tax Assessors*, 331 U. S. 486 (1947).

In this case the Court sustained the imposition of a tax on the transfer of legal title to a trust *res* of intangibles on the death of the prior trustee even though the beneficiary resided in another state. The Court reasoned that since the trust was administered in Rhode Island, certain

stions concerning it could only be resolved in the Rhode
nd state courts.

t cannot be contended that any court sitting within the
graphical boundaries of Philadelphia or Pennsylvania
eculiarly apt for enforcing the petitioner's rights pur-
nt to his employment contract with the United States
ey. It is, of course, axiomatic that at common law the
ereign was immune from suit by any perosn. Hence,
employee aggrieved by the failure of his sovereign em-
yer to pay wages rightfully due, would have been
rediless. This is not to say, however, that if the monies
re in fact appropriated and available mandamus would
have issued against the appropriate governmental offi-
to require him to pay the salary. The United States
now waived a substantial portion of its sovereign
nunity and is liable on express and implied contracts.
C. J. S. §177 (1955). Suit on such contracts may be
ught (subject to certain jurisdictional limitations not
ein material) in either the federal district court or the
rt of Claims. 28 U. S. C. §§1346, 1491 (1952). If the
is brought in the Court of Claims the action must be
Washington, D. C. 28 U. S. C. §174 (1952). Section
2 of the judicial code provides that so far as district
ts are concerned "any civil action against the United
es [on a contract] may be prosecuted only in the judi-
district where the plaintiff resides." 28 U. S. C. §1402
2). It becomes evident, therefore, that if the action
brought in Pennsylvania, venue would be mislaid.
a case would be transferred to the District of New
ey or dismissed. 28 U. S. C. §1406 (1952). In any
t, since the acts of Congress waiving sovereign im-
ty have not given jurisdiction to the state courts, the
could not be brought in the Pennsylvania courts.

Even if petitioner recovered judgment in a suit against
United States, he could not proceed to satisfy it

through the use of any court's process in Pennsylvania since the United States is exempt from levy and execution; rather, he would have to look to the general accounting office which is under the direction of the Comptroller-General for settlement. 28 U. S. C. §§ 2414, 2517 (1952). Should the Comptroller refuse to pay the judgment, mandamus could be obtained against him. *Citizens Bank and Trust Company* v. *United States*, 240 F. 2d 863 (D. C. Cir. 1956), cert. denied, 355 U. S. 825 (1957); *Hines* v. *United States, ex rel., Marsh*, 105 F. 2d 85 (D. C. Cir. 1939). This action, however, would be cognizable only in the United States District Court in the District of Columbia and not elsewhere. Note, 70 Harv. L. Rev. 350, 363 (1956); see *Alley* v. *Craig*, 97 F. Supp. 576, 577 (D. Me. 1951) (mandamus is "a remedy not within the jurisdiction of the district courts; excepting only the district court for the District of Columbia").

**(d) A state may tax the right of a person where it provides the conditions of an orderly society without which the owner could not acquire the right,** *Travis* **v.** *Yale & Towne Mfg. Co.*, **252 U. S. 60 (1920), or where the state protects a person whose activity is necessary for the transfer of a right to the taxpayer,** *Curry* **v.** *McCanless*, **307 U. S. 357 (1939) (*held* that Alabama, the domicile of the trustee, might tax the transfer of intangible assets of the trust passing under the will of a Tennessee domiciliary), or, in the case of an income tax, where the state provides that fundamental protection to the person which is rendered by the state of domicile and which is the *sine qua non* of the enjoyment of any right,** *Guaranty Trust Co.* **v.** *Virginia*, **305 U. S. 19 (1938).**

No argument can be made that any of these three grounds for taxation exist in the present case. The petition for *habeas corpus* alleges that the Navy Yard is used "solely

and exclusively as a shipyard for building, servicing, and maintaining ships of war and other vessels and equipment of the United States Navy."

Since the district judge gave judgment against the petitioner without hearing, on this state of the record the allegation must be taken to be that Philadelphia renders no service inside the area of the Navy Yard. Even if an eventual development of the facts would show that Philadelphia renders certain services such as the supply of water on a contractual basis with the United States, this is not analogous to the case of taxation of the income of non-residents by the state of performance of the services giving rise to wage claims. While as a matter of contract the Navy may permit the city to supply certain services, since the federal government has exclusive jurisdiction the city or state may be excluded and hence neither the city nor state acts as a matter of sovereignty. "'Sovereignty' * * * imports the supreme absolute, uncontrollable power by which any State is governed." *Paulus* v. *South Dakota*, 58 N. D. 643, 227 N. W. 52, 54 (1929), quoting *Cooley, Constitutional Limitations* 1 (7th ed. 1919). See *Chisholm* v. *Georgia*, 2 U. S. (2 Dall.) 419 (1793); *Union Bank* v. *Illinois*, 43 Tenn. (3 Cold.) 325 (1866). Taxing jurisdiction cannot be vested on the basis of contractual privity with the federal government. See *Miller Bros. Co.* v. *Maryland*, *supra*, where it was held that Maryland could not impose on a Delaware seller the duty to collect a tax validly imposed on the buyer for the use in Maryland of the item sold. It is well settled that a tax may not be enforced unless it is sought to be collected as a matter of sovereign right. See *O'Byrne* v. *Mayor and Aldermen*, 41 Ga. 331 (1870).

**(e) A state may not tax tangible personal property stored in another state even though owned by a domiciliary of the taxing state.**

*Frick* v. *Pennsylvania*, 268 U. S. 473 (1925).

The reason for the decision is that a state is justified in taxing property only where it affords some protection to the property. In the present case there is no personal property sought to be taxed, and therefore, the *Frick* rule, impliedly approving taxation by the state in which the property is physically located, has no application. As discussed above, neither Philadelphia nor Pennsylvania extend any protection to the petitioner's intangible right to income.

The present case, in summary, presents the Court with a picture of a taxing authority ignoring the fundamental requirement that it must have some connection to the taxpayer or his property. While there is no doubt that the courts have expanded the concept of "jurisdiction" to tax, nevertheless, due process of law must still have vitality in this field. See *Miller Brothers Co.* v. *Maryland*, *supra*; *cf. Commonwealth, ex rel. Luckett* v. *Radio Corp.*, *supra*. The Court cannot deny the petitioner's due process objection unless it holds that the mere fact that an atlas would show the Navy Yard within Philadelphia is a sufficient basis to tax. In this case not one of the characteristics normally flowing from physical contact with an area exists. To sustain Philadelphia in this case is to fix tax liability on a fiction, incompatibly with due process of law.

## POINT III

**The Buck Act is not authority for enforcement of a penalty action, arising out of a tax liability, against a federal employee employed on federal territory and a non-resident of the state or municipality seeking to exact the penalty.**

The *writ capias ad respondendum* executed against the petitioner George E. Thompson was not sanctioned by the Buck Act. The *capias* was not used as a mere civil process initiating an action to collect the alleged tax liability giving rise to the action. To the contrary, the *capias* was used to initiate a penalty action for $100.00 for each year in which no tax return was filed. This statutory penalty is fixed without reference to the amount of taxes allegedly owed and its payment would not discharge the obligation of the tax.

If it is assumed, contrary to the argument in Points I and II, *supra*, that the Buck Act affirmatively granted new taxing power to the states and their subdivisions without offending the Constitution, nothing in the act explicitly permits states or their subdivisions to enforce penalties within federal territory. Even a broad construction of the word "collect," to permit the execution of a civil arrest to guarantee the appearance of the petitioner to appear in a suit to collect the tax itself if state law allowed,* would not warrant the action of the Sheriff of Philadelphia in the present case. The arrest here was the initiating process in an action to collect a penalty not measured by the tax and whose payment would not discharge the obligation of the tax. The distinction between taxes and penalties is

---

* Pennsylvania law forbids resort to the process of arrest to initiate an action of debt for the tax itself. Rule of Civil Procedure 1481(a); (b) (9).

entirely clear, as Congress undoubtedly understood. For example, in *United States* v. *United States Industrial Alcohol Co.*, 103 F. 2d 97 (4th Cir. 1939), an action for taxes due from a distiller who illegally diverted its alcohol into the beverage market during prohibition, the defendant's argument that the tax was really a penalty failed. The Court held that Congress could validly tax alcohol illegally used at a higher rate than alcohol consumed legitimately and that this differential was not a penalty. Hence repeal of the prohibition laws could not abate the action which was predicated on the Revenue Act of 1926. See also *Liberia* v. *Nee*, 10 F. Supp. 336 (N. D. Fla. 1935); *Burlington County* v. *Martin*, 128 N. J. L. 203, 25 A. 2d 17 (Sup. Ct. 1942); *Walsh* v. *School District*, 343 Pa. 178, 22 A. 2d 909 (1941); *Young Men's Christian Ass'n* v. *Philadelphia*, 323 Pa. 401, 187 Atl. 204 (1936); *cf. United States* v. *Kahriger*, 345 U. S. 22 (1953).

Under recognized principles of statutory construction, the Buck Act cannot be construed as impliedly permitting the execution of the *capias* to collect penalties. Since it explicitly permits collection of a tax, the failure to provide for the collection of a penalty and the execution of process to this end indicates an intent to foreclose these possibilities. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), is persuasive in this regard. There, the Supreme Court of Louisiana had enjoined certain peaceful picketing by the defendant union. It was quite clear that ordinarily the picketing would have been protected conduct under the National Labor Relations Act. The action of the state court was defended on the ground that since the union had failed to file a non-communist affidavit with the N. L. R. B. and further had neglected to file organizational data with the Secretary of Labor, it had waived its rights in this regard. This Court, holding that since the consequences of noncompliance were specifically enumerated but

did not include that sought to be invoked in the state courts, reversed the judgment below and denied any expansion of the listed sanctions. See also, *United States* v. *Arredondo*, 31 U. S. (6 Pet.) 691, 741 (1832).

In Point I, *supra*, it has been shown that the Buck Act and the Public Salary Tax Act, upon which Philadelphia bases its action in the present case, recognized the development of case law which, appraised pragmatically, vested in the states and their subdivisions a broadened power to tax. Thus, the theory of *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 562 (1892), is applicable: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise or privilege in which the government or the public has an interest (citing cases). Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is without; nothing passes by mere implication." See also *Parrack* v. *Ford*, 68 Ariz. 205, 203 P. 2d 872 (1949).

Application of the above rules of statutory construction is well demonstrated in *The Queen* v. *The Churchwardens*, 1 App. Cas. 611 (H. L. 1876). In the *Churchwardens* case the House of Lords was concerned with an act by a superior authority vesting a power to levy and collect taxes in an inferior authority. Parliament had provided that the churchwardens of any parish could be lent money by the Public Works Loan Commissioners for purposes of ecclesiastical construction. The churchwardens were required to levy and collect taxes to repay the loan within 20 years. Pursuant to this authority, the wardens of Wigan Parish sought and obtained a loan and made appropriate repayments for 4 years. Thereafter, the churchwardens defaulted and the Commissioner secured a writ of mandamus from the Queen's Bench, requiring them to levy

the taxes and make repayments. On appeal, the House of Lords reversed the decision of the trial court on the ground that the mandamus was issued 21 years subsequent to the time of the loan. The Law Lords ruled that when Parliament gives one subdivision the power to lend money to another which is, in turn, empowered to levy taxes to repay the loan, the statutory grant must be strictly adhered to; hence, since the statute provided that the loan must be repaid within 20 years, there was no authority on behalf of the Commissioners to secure the mandamus subsequent to that time.

In the case on appeal here, there is a similar situation. Philadelphia, powerless to act without appropriate federal acquiescence, has in effect been granted "jurisdiction and power to levy and collect" an income tax under certain circumstances. It has not been granted any power to levy, much less execute, a penalty within the federal district for non-payment of the tax. Under these circumstances, the action of the sheriff is beyond any authority granted by the Buck Act.

*Howard* v. *Commissioners of Sinking Fund*, 344 U. S. 624 (1953), sustains this construction. In the *Howard* case, employees in the Naval Ordnance Plant in Louisville sought to avoid the local "occupational tax or license fee" on the ground that while the Buck Act permitted "income taxes" that term could not be fairly construed to include the tax in question. Even though seven members of the Court disagreed with the appellant's argument on the facts involved, it is perfectly clear that the entire Court required the tax to bear some relationship to net income, gross income or gross receipts. The penalty sought to be inflicted on the petitioner Thompson here fails to satisfy the *Howard* test for two reasons: (1) it is not a tax at all, and (2) it is unrelated to net income or gross income or receipts.

The City of Philadelphia cannot urge that the reservation of power to serve civil and criminal process in the cession act (Act of April 4, 1866, P. L. 96) extended this far. The cession act conferred no power to enforce a penalty for non-payment of a tax on the wages earned by a non-resident in the Federal Navy Yard. See *Fort Leavenworth R.R. Co. v. Lowe, supra.* The cession act must be strictly limited to its terms. No substantive liability for a penalty arising from non-payment of taxes was fixed by the cession act. Whether constitutionally feasible or not (see Point II, *supra*), the cession act, as well as the Buck Act, failed to vest jurisdiction in the City of Philadelphia to impose penalties for the failure to file returns or to pay municipal taxes on income earned by New Jersey residents working for the federal government on the federally acquired naval reservation on League Island.

## CONCLUSION

**The State of New Jersey respectfully urges this Court to grant the petition of George E. Thompson for a writ of certiorari to the United States Court of Appeals for the Third Circuit.**

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FILED
DEC 24 1958
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
*Petitioner*

v.

WILLIAM LENNON, Sheriff of Philadelphia,
*Respondent*

## REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT

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IN THE

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No. 522

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UNITED STATES *ex rel.* GEORGE E. THOMPSON,
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v.

WILLIAM LENNOX, Sheriff of Philadelphia,
*Respondent*

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## REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT

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Respondent's opposition purportedly raises new and different issues to those presented by petitioner and discussed in the brief amicus of the State of New Jersey. These deviations simply attempt to create false issues, demonstrably so, in that petitioner, without compromising his position in the slightest, would agree with respondent that the answers to both counterstated questions should be "no." But these are not the questions this court is being asked to consider.

Neither counterstated question specifies the total absence of local contacts independent of the performance of duties as an employee of the United States in a place under the exclusive jurisdiction of the United States.

Counterstated Question I translates petitioner's narrow but important claim that under these circumstances he is imprisoned for an act done or omitted in pursuance of the laws of the United States, to the amorphous term, "challenge the validity of the ordinance." The nature of the claim is not only unspecified in terms of the circumstances, but those circumstances are obscured by loose description, and a most important one, that state custody was assumed and maintained in a place under the exclusive jurisdiction of the United States until application was made to the federal court for writ of habeas corpus, is omitted.

Counterstated Question II clearly embraces cases where a federal employee has local contacts independent of his federal employment. Non-residence, for example, does not preclude the traditionally recognized contact of domicile.

Respondent pursues these false issues throughout his brief: Discussion of the exhaustion principle in general terms only, its relative the Pennsylvania Habeas Corpus Act, unchallenged applications of the ordinance* in situations like the *O'Keefe* case, 306 U.S. 466 (local contact: state residence) and *Howard v. Commissioners*, 344 U.S. 624 (local contact: county

* The text of the ordinance was pleaded by the City in its "Affidavit to Hold to Bail," attached to the petition, and a part of the record (R. 6a-7a). The text in respondent's brief is essentially the same, except that there is some immaterial difference in the amount specified.

residence), etc. In reply, petitioner points out, as in the distinctions made with respect to the counterstated questions, that this case does not fit into the routine pigeon holes respondent has fashioned for it.

Yet the force of the real issues requires some disposition. Respondent says (p. 7), "* * * the District court found as a matter of fact that petitioner's refusal to file a return and pay a tax was not 'an act done or omitted in pursuance of the laws of the Congress of the United States.'" What respondent here treats as a "finding of fact by the trial judge," is one of the crucial questions of law in this case. This treatment of it is the more astounding when it is remembered that this case was disposed of by the trial court on motion to dismiss the petition as insufficient on its face, and without the taking of evidence.

Nor is the issue disposed of by epigram: "Petitioner's failure to pay his tax was not a part of his duties as a civilian employee of the Federal Government." (p. 7). One might as well say that murder was no part of Marshal Neagle's duties, and that failure to obtain a driver's license was no part of a mail-truck driver's duties. *In re Neagle*, 135 U.S. 1, *Johnson* v. *Maryland*, 254 U.S. 51. Analysis might proceed more fruitfully by considering the nature of the activity upon which the local obligation was incident.

The thrust of the real issues in this case may be seen through respondent's counterstatement of it where, speaking of the local sheriff taking petitioner into custody at the Navy Yard, he claims this was done:

"With the consent of the appropriate federal authorities at the Naval Shipyard (R. 22a) and pursuant to the Act Cession of April 4, 1866, P.L. 96, s. 1. note, permitting all State process to extend into the Navy Yard * * *" (p. 3).

Petitioner will not pause to deal with the welter of inaccuracies contained in so brief a quote except to note that the whole question here is:

Whether the federal government did give its consent to the arrest and imprisonment of a federal employee in a federal enclave by local authorities, absent a local contact; and if so, whether such consent violated the 4th and 5th Amendments.

This question is important to petitioner, over 2,000 federal employees at the Shipyard similarly situated, the State of New Jersey, the "appropriate federal authorities" at the Shipyard and elsewhere, as well as federal employees all over the country.

The question is principally important, however, in the development of federal jurisprudence. It has not been, but should be settled by this court.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
*Petitioner*

v.

WILLIAM LENNON, Sheriff of Philadelphia,
*Respondent*

## PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE THIRD CIRCUIT

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## INDEX


| | Page |
|---|---|
| Summary Statement | 1 |
| Point 1: The Court Below adjudicated the merits of the Petition for Habeas Corpus | 2 |
| Point 2: Administrative Action Impeding Review | 3 |
| Appendix A: Special Order of Secretary of Navy | 8 |
| Appendix B: Sample Disciplinary Letter | 9 |


### TABLE OF CASES


| | |
|---|---|
| Frisbie v. Collins, 342 U.S. 519 | 3 |
| Graves v. New York ex rel. O'Keefe, 306 U.S. 466 | 4 |
| Howard v. Commissioners, 344 U.S. 624 | 5 |
| Kiker v. Philadelphia, 346 Pa. 624, 31 A2d. 289, cert. den. 320 U.S. 741 | 5 |
| Philadelphia v. Cline, 158 Pa. Super. 179, 44 A2d. 680, cert. den. 328 U.S. 848 | 5 |
| Thomas v. Arizona, 356 U.S. 390 | 3 |


### OTHER REFERENCES


| | |
|---|---|
| Public Salary Tax Act, 53 Stat. 575 | 4 |
| Senate Finance Subcommittee Hearings on H.R. 6687, April 23, 1940, 76th Cong., 3rd Sess. | 5 |
| Bureau of the Budget, Circular No. A 38 (Revised) of 23 December 1954 | 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 522

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UNITED STATES *ex rel.* GEORGE E. THOMPSON,
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v.

WILLIAM LENNOX, Sheriff of Philadelphia,
*Respondent*

---

## PETITION FOR REHEARING ON ORDER DENYING PETITION FOR CERTIORARI

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Petitioner respectfully urges the Court to grant a rehearing on its order of January 12, 1954, denying the petition for writ of certiorari herein, and to grant said petition; and for reason therefor shows the following grounds not previously presented which are believed to be substantial:

1. Although the precise ruling of the court below was seemingly on a discretionary point: that the

petition for habeas corpus was premature for failure to exhaust state remedies; analysis will show that this ruling stems not from an exercise of discretion, but from a determination of questions of law which go to the merits of the petition. The promise of future proceedings in state or federal courts (R. 16a, 22a, n. 24) is therefore an empty one, and the merits of the petition are now presented to this Court for review.

2. Moreover, in appraising the importance of the questions raised on the merits, and the urgency of reiew by this Court at this time, the Court should consider certain administrative action taken by the federal government which, in practical operation, has in the past and will in the future prevent review of this important question.

**1. The Court Below Adjudicated the Merits of the Petition for Habeas Corpus**

Admittedly the ruling of the lower court was *in form* a dismissal for failure to exhaust state remedies, leaving open the question on the merits until after that had been accomplished (R. 14a, 16a, 22a, n. 24).

But the court also plainly based its dismissal on the merits (R. 17a) and proceeds to discuss and rule upon the merits (R. 17a-22a).

This ruling on the merits in conjunction with a ruling designed to postpone decision on the merits, while awkward, is less inconsistent than it might at first appear. The discussion captioned "This court should not exercise its discretion to grant the writ at this time under the circumstances of this case," does not purport to be a "factual appraisal by the court in each special situation," as required by

*Frisbie* v. *Collins*, 342 U.S. 519, 521. Instead it is devoted exclusively to citation and quotation at length from cases concerned only with the general rule on exhaustion of state remedies. The only mention of "special circumstances" admitting any departure from this general rule is relegated to a footnote (R. 15a, n. 7). But it there appears that the lack of "special circumstances" depends on the court's legal determination that "Petitioner's failure to pay his local taxes was not part of his duties as a civilian employee of the federal government." For the basis of such ruling we must refer to the merits. Since petitioner had no local contact independent of the performance of his duties as a federal employee within a federal enclave, his duties with respect to the local tax (and penal laws) would depend entirely upon a construction of the revelant Acts of Congress and the 4th and 5th Amendments to the Constitution. This is not simply *a* question of law, this is *the* question of law basic to the merits of the petition.

The lower court has ruled on the merits, as such, and as the basis for its holding that the petition for habeas corpus was premature. The promise of future proceedings is therefore illusory, and the merits are before this Court. *Thomas* v. *Arizona*, 356 U.S. 390, 392, N. 1.

**2. Administrative Action Impeding Review**

It is only by grace of a special order of the Secretary of the Navy, reprinted in Appendix A to this Petition, p. 8, that this case has progressed thus far. The denial of certiorari by this Court in two prior cases involving the same matter, although not the same claims or circumstances, has had the practical effect

of approval of those state court holdings insofar as the relationships between the City of Philadelphia and the Naval Shipyard are concerned. The City has demanded and been provided by the Shipyard with names, addresses, and earnings of its New Jersey employees (Bureau of the Budget, Circular No. A 38 (Revised) of 23 December, 1954). The Shipyard has attempted to reduce the burdens cast upon it by the enforcement methods of the City (shown in an amendment to the petition, R. 11a) by threatening disciplinary action against federal employees who fail to settle the tax obligation with the City. A sample Shipyard letter to this effect is reprinted in Appendix B hereto, p. 9a. Many federal employees have left their employment as a result of the City's attempts to enforce the tax (R. 11a). Others have been discharged for failure to comply with what the Shipyard conceives to be their legal obligation with respect to this tax and its enforcement. An action contesting the right of the federal government to enforce such determination of its employee's rights is now pending in the United States District Court for the District of Columbia (C.A. No. 2821-58). But this will not settle the merits of this case.

Yet there has been no prior ruling by this Court, or by any federal court, on this subject. Since the removal of the general state tax immunity from federal salaries in *Graves* v. *New York ex rel O'Keefe*, 306 U.S. 466, and the companion Public Salary Tax Act, 53 Stat. 575, all of which occurred within the space of two weeks in 1939, there has been no further exposition upon the subject by this Court. Specifically there has been no ruling on whether the performance of duties by federal employees, as such, and without

any other local contact, may be made the subject of local taxation. The subject was touched upon by the minority in *Howard* v. *Commissioners,* 344 U.S. 624, 629, the only federal employee tax case to reach this Court within the last twenty years. However, the majority did not discuss the matter, presumably because there was in that case a local contact independent of Federal employment, namely, residence in the same county in which the taxing city was located.

In this void stands *Kiker* v. *Philadelphia,* 346 Pa., 624, 31 A. 2d 289, Cert. den. 320 U.S. 741, and its derivative, *Philadelphia* v. *Cline,* 158 Pa. Super. 179, 44 A. 2d 680, Cert. den. 328 U.S. 848. While neither case specifically discusses the points raised here, their disposition by silence, thrust upon the vast impersonal federal personnel machinery, has virtually placed them beyond challenge by the ordinary federal employee.

The phrase, "thrust upon," is deliberately chosen. Departmental acquiescence is plainly a consequence of the pre-eminence of the *Kiker* case on this subject. Certainly at the time of the hearings on the Buck Act neither the Administration nor Congress entertained such a view. See for example, Senate Finance Subcommittee Hearings on H. R. 6687, April 23, 1940, 76th Congress, 3rd Session, page 26, and discussion in the amicus brief of the State of New Jersey, pp. 7-8. When the day comes that some important or secret federal agent is arrested by local authorities for failure to furnish information on a local tax return about his comings and goings in a community away from his home, perhaps the federal government will direct its discomfiture with the situation at someone other than its own employees. But this may happen

too late for the federal government to repudiate its acquiescence, and certainly too late to relieve now helpless federal employees.

No federal-state controversy could be more direct and basic than the exercise of State jurisdiction to tax, fine, arrest, and imprison federal employees upon the single jurisdictional event of their having performed their duties as federal employees inside the State's borders, and moreover, within a federal enclave therein. Unfortunately litigation of such a controversy is beyond the means of the ordinary federal employee. Even here, where a single group of over 2000 is directly involved, it is difficult. Federal employees are restricted by the threat of disciplinary action. They are circumscribed by a prohibition against partisan political activity. They lack a substantial, well organized, well financed bargaining group.

In the face of this situation, only heroic persistence, fed by gross injustice and cruel methods of enforcement has produced a vehicle for determining the important questions presented here. But heroism has its limits. Few will be found with the necessary temerity to raise this question again, and the construction and validity of fundamental federal legislation will have been conclusively settled by a single State court and the denial of certiorari here.

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## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioner although not previously presented.

LANDON GERALD DOWDEY

**Appendix A: Special Order of Secretary of the Navy**

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

JAG:132:cms
30 Mar 1957

From: Secretary of the Navy

To: Commandant, Fourth Naval District

Subj: Service of process in connection with enforcement of Philadelphia Wage Tax against employees of Philadelphia Naval Shipyard

Ref: (a) Sec Nav ltr of 20 Dec. 1956

Encl: (1) Copy of Sec. Nav. ltr to Senator Case of even date

(2) Copy of Sec. Nav. ltr to Mr. Landon G. Dowdey of even date

1. Reference (a) approved the proposal to permit service of process within the Philadelphia Naval Shipyard in connection with the Philadelphia wage tax for purpose of a test case on the conditions requested by the Commandant that the variation in procedure be limited to the test case only and that the City authorities consent. I have now been informed that the City authorities are not agreeable to this proposal.

2. Upon further consideration of the matter, I have reached a decision that regardless of the nonconcurrence of the City officials, it will be in the best interests of the Navy to give the employees an opportunity to attempt to have this matter resolved by a federal court.

3. It is therefore directed that when an appropriate case presents itself, involving a New Jersey resident, arrangements be made for service at some place within the Shipyard which is decided upon by the Commander

of the Shipyard. Sufficient advance notice should be given to Mr. Landon G. Dowdey, the attorney who represents the Wage Tax Protest League of New Jersey.

4. The above requirement applies to only one case. The procedure generally will not be changed, at least until the outcome of the test case is known.

(s) W. B. FRANKE
*Assistant Secretary of the Navy*

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**Appendix B: Sample Disciplinary Letter**

PHILADELPHIA NAVAL SHIPYARD
NAVAL BASE
PHILADELPHIA 12, PA.

16 November 1954

From: Commander, Philadelphia Naval Shipyard
To:
Subj: Tax Delinquency

1. Information has been received from the Department of Collections, City of Philadelphia, indicating that you are delinquent in paying the Wage Tax for the years and in the amounts listed below.

| Year | Amount |
|---|---|

2. While neither the Navy Department nor the Shipyard considers itself a collection agency or arbitrer concerning the validity of a debt, both do expect employees to assume a responsible attitude towards their obligations. Failure on your part to assume such an attitude will be considered sufficient reason to initiate disciplinary action or to suspend or separate

you from employment. It is therefore unquestionably to your interest to make immediate arrangements to settle this matter satisfactorily.

3. Future communications concerning this matter will be made an official part of your record and will be considered when personal actions of importance are taken.

P. W. HAAS, JR.
D. A. READER
by direction